TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 209

GREAT NORTHERN RAILWAY COMPANY, PETITIONER,

vs.

McCAULL-DINSMORE COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

PETITION FOR CERTIORARI FILED JANUARY 29, 1923

CERTIORARI AND RETURN FILED AUGUST 10, 1923

(29,370)

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[fol. 1] STATE OF MINNESOTA:

IN SUPREME COURT

1922

STATE OF MINNESOTA,
County of Hennepin:

DISTRICT COURT, 4TH JUDICIAL DISTRICT

McCAULL-DINSMORE COMPANY, Plaintiff

vs.

GREAT NORTHERN RAILWAY COMPANY, Defendant

COMPLAINT

Plaintiff in the above entitled action alleges and respectfully shows to the court:

First. That during all the time hereinafter mentioned, the plaintiff was and still is doing business under the firm name and style of McCaull-Dinsmore Company.

Second. That during all the time hereinafter mentioned, the defendant was and still is a railway corporation and common carrier, of interstate merchandise by rail, for hire, between the city of St. Paul, Minnesota, and the city of Great Falls, Montana, passing into and through the town or station of Benchland, Montana, and other [fol. 2] intermediate points and places, owning, maintaining and operating all of the facilities necessarily used in connection with its business as an interstate carrier of merchandise.

Third. That between the dates of August 23, 1913, and September 3, 1914, the plaintiff at the station of Benchland, Montana, offered for shipment to the defendant company thirty-seven cars of wheat, to be transported by the defendant company over its line of railway from the said station of Benchland, Montana, to the station or cities of Minneapolis, Minnesota, and Duluth, Minnesota; that the defendant accepted the said thirty-seven cars of wheat for shipment as aforesaid, and that the plaintiff thereby became liable and indebted to the defendant company for the amount of the legal and lawful rate for the transportation of the said wheat between the points aforesaid.

Fourth. That the defendant in the due course of transportation delivered the said wheat to the plaintiff, or the plaintiff's consignee at the town or station of Minneapolis, Minnesota, and Duluth, Minnesota, and collected from the plaintiff at or prior to the delivery of the said wheat, a sum amounting to two cents (8.02) per cwt. in excess of the legal and lawful rate on each carload of wheat so transported and delivered.

Fifth. That the defendant between the dates hereinbefore set forth and on the quantity of wheat so transported as herein alleged, [fol. 3] as is more particularly set forth on lists or statements hereto attached marked "Exhibit A, B," and made a part hereof, which lists give the dates of shipment of the said cars in question and the amount collected by the defendant in excess of the lawful rate. That the defendant did collect and take from the plaintiff and convert to its own use at the said station of Minneapolis, Minnesota, and Duluth, Minnesota, the sum of five hundred ninety and 26/100 dollars ($590.26), which money is the lawful property of the plaintiff, and which money has been since the dates herein set forth, retained and kept by the defendant who has refused to return it to the plaintiff, although the return thereof has been often demanded.

Wherefore, plaintiff prays judgment against the defendant for five hundred ninety and 26/100 dollars ($590.26) with interest thereon according to law, together with the costs and disbursements of this action.

John P. Devaney, Attorney for Plaintiff, 819-825 1st Natl. Soo Bldg., Minneapolis, Minnesota.

[fol. 4] EXHIBIT A TO COMPLAINT

McCaull-Dinsmore Co., Minneapolis, Minn.

Station: Benchland, Mont.

Date	Car No.	Int.	Weights	Frt. chges.	Overchges.	Dest.
1913.						
11-6	120152	GN	61,270	183.81	12.25	Duluth.
8-26	207869	"	70,020	210.06	14.00	"
8-26	127071	"	86,500	259.50	17.30	"
9-5	29098	"	81,160	243.48	16.23	"
9-4	121393	"	86,900	260.70	17.38	"
9-5	28516	"	85,030	255.09	17.00	"
9-4	23912	"	86,570	259.71	17.31	"
8-27	220529	"	66,750	200.25	13.35	"
8-27	121246	"	85,950	257.85	17.19	"
8-23	212175	"	65,940	197.82	13.19	"
8-23	205218	"	59,400	178.20	11.88	"
9-4	28150	"	86,000	258.00	17.20	"
8-28	26374	"	85,950	257.85	17.19	"
8-28	33536	"	87,540	262.62	17.51	"
8-22	121636	"	86,180	258.54	17.24	"
8-28	208109	"	65,790	197.37	43.16	"
[fol. 5]						
8-28	16720	"	62,950	188.85	12.59	"
1914.						
7-6	17361	"	61,140	183.42	12.23	"
8-21	22531	"	86,980	260.94	17.39	"

EXHIBIT A TO COMPLAINT—Continued

Date	Car No.	Int.	Weights	Frt. chges.	Overchges.	Dest.
8-23	207475	GN	75,470	226.41	15.09	Duluth.
8-23	220176	"	65,940	197.82	13.19	"
8-23	122944	"	92,220	276.66	18.44	"
8-23	112372	"	85,160	255.48	17.03	"
8-23	11619	"	86,520	259.56	17.30	"
8-23	14394	"	84,470	253.41	16.89	"
9-3	206240	"	65,710	197.13	10.14	"
8-22	14587	"	87,360	262.08	17.47	"
8-23	211119	"	90,000	240.00	16.00	"

[fol. 6]

EXHIBIT B TO COMPLAINT

McCaull-Dinsmore Co., Minneapolis, Minn.

Station: Benchland, Mont.

Date	Car No.	Int.	Weights	Frt. chges.	Overchges.	Dest.
1914.						
8-30	127281	GN	88,000	264.00	17.60	Minneapolis.
8-31	27084	"	88,550	265.65	17.11	"
9-30	111976	"	89,750	269.25	17.95	"
9-3	122021	"	87,860	263.58	17.57	"
8-29	11534	"	84,340	253.02	16.87	"
8-29	10045	"	87,930	263.79	17.59	"
8-29	125457	"	87,850	263.55	17.57	"
8-29	11549	"	85,950	257.85	17.19	"
8-29	123709	"	88,340	265.02	17.67	"

[fol. 7] IN THE DISTRICT COURT OF HENNEPIN COUNTY

(Title of Cause)

ANSWER

Comes now the defendant and for its answer to plaintiff's complaint, denies each and every allegation therein contained not herein specifically admitted.

The defendant admits that the allegations contained in paragraphs 1 and 2 of plaintiff's complaint are true.

Further answering said complaint and for a further defense thereto, defendant alleges that if it collected from the plaintiff the freight charges on the cars of grain set forth in plaintiff's complaint, said charges were the charges provided by the defendant's tariffs, regularly published and filed with the Interstate Commerce Commission as required by law, and that said charges were made and collected more than four years prior to the commencement of the above entitled action and that no complaint for the recovery of damages on account of the collection of said charges was filed with the Interstate Commerce Commission within two years after plaintiff's alleged cause of action accrued or in this court at any time prior to the commencement of the above entitled action.

Wherefore, defendant prays that plaintiff take nothing and that defendant may be hence dismissed with its costs and disbursements herein.

Dille, Hoke, Krause & Faegre, Attorneys for Defendant, 300 Security Building, Minneapolis, Minnesota.

[fol. 8] IN THE DISTRICT COURT OF HENNEPIN COUNTY

(Title of Cause)

REPLY

Plaintiff herein for its reply to the answer of the above named defendant:

Denies each and every allegation of new matter in said answer contained.

Wherefore, plaintiff prays for judgment against the defendant as by its complaint it hath demanded.

John P. Devaney and Theodore W. Thompson, Attorneys for Plaintiff, 1132-56 Builders Exchange, Minneapolis, Minn.

IN THE DISTRICT COURT OF HENNEPIN COUNTY

(Title of Cause)

Settled Case

The above entitled action having been regularly placed upon the September 1919-1920 general term calendar of said court, came on for trial in its order and was tried before the Honorable John H. Steele, one of the judges of said court, without a jury, on the 25th day of June, 1920, at the court house in the city of Minneapolis, Hennepin county, Minnesota.

Messrs. John P. Devaney, Theodore W. Thompson and H. C. Wilson, appeared as counsel on behalf of the plaintiff and Messrs. Dille, Hoke, Krause & Faegre, and F. G. Dorety appeared on behalf of the defendant, whereupon the following proceedings were had.

[fol. 9] The parties made and filed the following stipulation of facts, and submitted said cause for trial and determination thereon, said stipulation being in words and figures as follows, to-wit:

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties in the above entitled action by and through their respective attorneys that in the trial of said action, the relevant and material facts are as follows:

First. That the plaintiff herein is a corporation, duly organized and existing under and by virtue of the laws of the state of Minnesota and is entitled to maintain this action in its behalf.

Second. That the defendant herein is a corporation and common carrier for hire of property between points in the state of Minnesota and points in Montana and other states and as such common carrier is subject to the provisions of the Act to Regulate Commerce, approved February 4, 1887, and acts amendatory thereof and supplementary thereto.

Third. That the lines or routes owned and operated by the defendant extend among other places from Billings, Mont., to Minneapolis and Duluth, Minnesota.

Fourth. That the distance from Billings, Montana, to Minneapolis is 1,253 miles and to Duluth 1,291 miles over defendant's lines extending from Billings, Montana, through Benchland, Great Falls and Havre, Montana, to Minneapolis and Duluth, Minnesota; [fol. 10] that Benchland, Montana, is a station on said line of defendant between Billings and Great Falls, Montana; that the distance from Benchland, Montana, to Minneapolis, Minnesota, is 1,101 miles and to Duluth, Minnesota, 1,139 miles; and that shipments transported by defendant from Billings, Montana, to Minne-

apolis, Minnesota, and Duluth, Minnesota, pass through Benchland, Montana, en route and from thence pass over the same lines and routes as do shipments from said Benchland.

Fifth. That between the dates of August 22, 1913, and September 3, 1914, the plaintiff herein delivered to the defendant at the station of Benchland, Montana, thirty-seven (37) carloads of wheat as more particularly described in Exhibits "A" and "B," attached hereto and made a part hereof for transportation over the defendant's lines to Minneapolis and Duluth, Minnesota; that the defendant accepted said shipments, transported them in due course to Minneapolis and Duluth; and there delivered the same to the plaintiff, or to the plaintiff's consignees.

Sixth. That at or about the time of the delivery of said shipments, defendant collected and received for the transportation thereof from the plaintiff, freight charges in the amounts set forth in said Exhibits "A" and "B," based upon a rate of thirty cents ($.30) per 100 pounds; and that said freight charges were paid and borne by the plaintiff.

Seventh. That defendant's tariff I. C. C. No. A3720 published [fol. 11] and filed with the Interstate Commerce Commission effective August 5, 1913, and in effect during all the time herein mentioned, named a rate of thirty cents ($.30) per 100 pounds from Benchland, Montana (Index 100), and a rate of twenty-eight cents ($.28) per 100 pounds from Billings, Montana (Index 124), respectively, to Minneapolis and Duluth for the transportation of wheat in carloads over defendant's lines from and to said points.

Eighth. That Section 4 of said Act to Regulate Commerce as amended June 18, 1910, provides as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this act; but this shall not be construed as authorizing any common carrier within the terms of this act to charge or receive as great compensation for a shorter as for a longer distance: Provided, however, that upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the commission to charge less [fol. 12] for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section; provided further, that no rates or charges lawfully existing at the time of the passage of this amendatory act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months

after the passage of this act, nor in any case where application shall have been filed before the commission, in accordance with the provisions of this section, until a determination of such application by the commission."

Ninth. That defendant during all the time herein mentioned was not authorized by said Interstate Commerce Commission to charge a lower rate for the transportation of wheat in carloads, from Billings, Montana, to Minneapolis and Duluth, Minnesota, than it contemporaneously charged for the transportation of like shipments from Benchland, Montana, to Minneapolis, Minnesota, and Duluth, Minnesota; but that on or about December 3, 1910, the defendant filed before the Interstate Commerce Commission of the United States an application signed and sworn to by W. P. Kenney, its assistant traffic manager, reading as follows:

"The Great Northern Railway Company, through its assistant traffic manager, petitions the Interstate Commerce Commission for authority to continue class and commodity rates for the transporta-[fol. 13] tion of all freight as covered in GN GFO No. 21600, Joint Tariff I. C. C. A-3162, and superseding issues not involving basis changes, according to the rate, group or zone adjustments as designated in said tariff or superseding issues under which adjustments the rates via certain routes to or from more distant points are lower than to or from intermediate points," as illustrated by the following:

"Northern Pacific distance St. Paul to Billings, Mont., is 890 miles, first class rate $1.95.

The Great Northern distance St. Paul to Billings, Mont., is 1,300 miles. To engage in this traffic, we must make the same rates for $1,300 miles as the Northern Pacific do for 890 miles, but in doing so we should not be compelled to pull down all our intermediate rates. In other words, we should not be compelled to make as a natural rate for 1,300 miles the rate which the Northern Pacific makes as a natural rate for 890 miles.

The first class rate from St. Paul to Great Falls is $2.10, this being the normal rate, distance 1,067 miles.

Omaha to Billings via the C. B. & Q. is 892 miles, Omaha to Billings via the C. N. & W., Sioux City and Great Northern 1,547 miles, first class rate Omaha to Billings $1.95; to Great Falls $2.25; relative adjustment on commodities, etc.

A copy of the tariff mentioned is attached hereto and made a part hereof.

The existing rate adjustments in said tariff have been deter-[fol. 14] mined by geographical, commercial and competitive conditions.

This application is based upon the desire of petitioner to meet by direct haul over longer lines or routes competitive conditions created at more distant points by shorter and more direct workable routes."

That thereafter, the said commission acknowledged receipt of said application by letter reading as follows:

"Washington, December 21, 1910.

Mr. W. P. Kenney,
Asst. Traffic Manager,
Great Northern Railway Company,
St. Paul, Minn.

DEAR SIR:

The application of the Great Northern Railway Company for relief under the Fourth Section of the Act to Regulate Commerce, dated December 3, 1910, your number —, has been received.

In referring to this application please give commission's number 827.

Very respectfully, (Signed) Edward A. Moseley, Secretary."

Tariff No. G. N. GFO No. 21600 ICC A-3162.

That said application was pending before the Interstate Commerce Commission during the time herein mentioned and had not been finally determined by said commission.

That said Tariff G. N. GFO 21600 referred to in said application [fol. 15] contained grain rates from Billings to the Eastern Terminals referred to in the complaint, and also from said station of Benchland, Montana, to said terminals, of 32 cents per hundred pounds, and was the only Great Northern tariff carrying commodity rates on grain between said points at said time.

That said tariff was superseded effective July 25, 1911, by G. N. GFO 22600, I. C. C. A-3400, which continued the same basis of rates on grain from Billings and other Montana stations, including Benchland, to said terminals.

That said last named tariff was superseded during the year 1912 as to commodities other than grain by Agent Countiss' Joint Tariff I. C. C. 949, and that as to eastbound grain rates said tariff was superseded by G. N. GFO 23721, I. C. C. A-3630, effective January 10, 1913, carrying the same eastbound grain rates above referred to.

That said last named tariff was superseded by G. N. GFO I. C. C. A-3720, effective August 5, 1913, being the tariff above referred to in paragraph Seventh of this stipulation. That the tariffs herein referred to were during the times above referred to the only tariffs carrying commodity rates on grain over the lines of the Great Northern Railway Company from Billings and Benchland, Montana, to the Eastern Terminals above referred to.

Tenth. That the differences between the charges collected from the plaintiff by defendant and the charges that would have accrued [fol. 16] at the rate of 28 cents per 100 pounds on each of said shipments are correctly set forth in the column entitled "Overcharges," in said Exhibits "A" and "B" attached hereto, and aggregate the sum of five hundred ninety and 26/100 dollars ($590.26); and that if it be determined that the charges collected as aforesaid were unlawful to the extent that they exceeded the charges that

would have accrued at the rate of twenty-eight (28) cents per 100 pounds as contended by the plaintiff, the plaintiff is entitled to a judgment against the defendant for five hundred ninety and 26/100 dollars ($590.26) together with interest thereon and the costs and disbursements of this action.

John P. Devaney, Theodore W. Thompson, and H. C. Wilson, Attorneys for Plaintiff. Dille, Hoke, Krause & Faegre and F. G. Dorety, Attorneys for Defendant.

McCaull-Dinsmore Co., Minneapolis, Minn.

Station: Benchland, Mont.

Date	Car No.	Int.	Weights	Frt. chges.	Overchges.	Dest.
1913.						
11-6	120152	GN	61,270	183.81	12.25	Duluth.
8-26	207869	"	70,020	210.06	14.00	"
8-26	127071	"	86,500	259.50	17.30	"
9-5	29098	"	81,160	243.48	16.23	"
9-4	121393	"	86,900	260.70	17.38	"
9-5	28516	"	85,030	255.09	17.00	"
9-4	23912	"	85,670	259.71	17.31	"
8-27	220529	"	66,750	200.25	13.35	"
8-27	121246	"	85,950	257.85	17.19	"
8-23	212175	"	65,940	197.82	13.19	"
8-23	205218	"	59,400	178.20	11.88	"
9-4	28150	"	86,000	258.00	17.20	"
8-28	26374	"	85,950	257.85	17.19	"
8-28	33536	"	87,540	262.62	17.51	"
8-22	121636	"	86,180	258.54	17.24	"
8-28	208109	"	65,790	197.37	13.16	"
[fol. 18]						
8-28	16720	"	62,950	188.85	12.59	"
1914.						
7-3	17351	"	61,140	183.42	12.23	"
8-21	22534	"	86,980	260.94	17.39	"

EXHIBIT A TO STIPULATION—Continued

Date	Car No.	Int.	Weights	Frt. chges.	Overchges.	Dest.
8-23	207475	Int.	75,470	226.41	15.09	Duluth.
8-23	220176	"	65,940	197.82	13.19	"
8-23	122944	"	92,220	276.66	18.44	"
8-23	112372	"	85,160	255.48	17.03	"
8-23	11619	"	86,520	259.56	17.30	"
8-23	14394	"	84,470	253.41	16.89	"
9-3	206240	"	65,710	197.13	10.14	"
8-22	14587	"	87,360	262.08	17.47	"
8-23	211119	"	90,000	240.00	16.00	"

[fol. 19]

EXHIBIT B TO STIPULATION

McCaull-Dinsmore Co., Minneapolis, Minn.

Station: Benchland, Mont.

Date	Car No.	Int.	Weights	Frt. chges.	Overchges.	Dest.
1914.						
8-30	127281	GN	88,000	264.00	17.60	Minneapolis.
8-31	27084	"	88,550	265.65	17.11	"
9-30	111976	"	89,750	269.25	17.95	"
9-3	122021	"	87,860	263.58	17.57	"
8-29	11534	"	84,340	253.02	16.87	"
8-29	10045	"	87,930	263.79	17.59	"
8-29	125457	"	87,850	263.55	17.57	"
8-29	11549	"	85,950	257.85	17.19	"
8-29	123709	"	88,340	265.02	17.67	"

[fol. 20] IN THE DISTRICT COURT OF HENNEPIN COUNTY

(Title of Cause)

COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled proceeding came on for hearing before the undersigned, one of the judges of said court, at the September, 1919, general term thereof, on the 25th day of June, 1920, without a jury, a jury having been duly waived.

H. C. Wilson, Esq., and Theodore W. Thompson, Esq., appearing as counsel on behalf of the plaintiff, and F. G. Dorety, Esq., and Messrs. Hoke, Dille, Krause and Faegre appeared as counsel for the defendant, and the court having the testimony adduced by the respective parties and duly considered the same, together with the stipulation of facts filed by the parties, makes the following

Findings of Fact

1. That during all the time mentioned in the pleadings the plaintiff herein was, and still is a corporation, duly organized and existing under and by virtue of the laws of the state of Minnesota, and is entitled to maintain this action in its behalf.

2. That during all of said time the defendant herein was, and still is a corporation and common carrier for hire of property between points in the state of Minnesota and points in Montana and other states and as such common carrier is subject to the provisions of the Act to Regulate Commerce, approved February 4, 1887, and acts amendatory thereof and supplementary thereto.

3. That the lines or routes owned and operated by the defendant [fol. 21] extend among other places from Billings, Montana to Minneapolis and Duluth, Minnesota.

4. That the distance from Billings, Montana to Minneapolis is 1,253 miles and to Duluth 1,291 miles over defendant's lines extending from Billings, Montana, through Benchland, Great Falls, and Havre, Montana to Minneapolis and Duluth, Minnesota; that Benchland, Montana is a station on said line of defendant between Billings and Great Falls, Montana; that the distance from Benchland, Montana, to Minneapolis, Minnesota, is 1,101 miles and to Duluth, Minnesota 1,139 miles and that shipments transported by defendant from Billings, Montana, to Minneapolis, Minnesota and Duluth, Minnesota, pass through Benchland, Montana enroute, and from thence pass over the same lines and routes as do shipments from said Benchland.

5. That between the dates of August 22, 1913, and September 3rd, 1914, the plaintiff herein delivered to the defendant at the station of Benchland, Montana, thirty-seven (37) carloads of wheat as more particularly described in Exhibits "A" and "B" attached hereto and made a part hereof for transportation over the defendant's lines to

Minneapolis and Duluth, Minnesota; that the defendant accepted said shipments, transported them in due course to Minneapolis and Duluth, and there delivered the same to the plaintiff, or to the plaintiff's consignees.

[fol. 22] 6. That at or about the time of the delivery of said shipments, defendant collected and received for the transportation thereof from the plaintiff, freight charges in the amounts set forth in said Exhibits "A" and "B," based upon a rate of thirty cents ($.30) per 100 pounds; and that said freight charges were paid and borne by the plaintiff.

7. That defendant's tariff I. C. C. No. A-3720 published and filed with the Interstate Commerce Commission effective August 5, 1913, and in effect during all the time herein mentioned, named a rate of thirty cents ($.30) per 100 pounds from Benchland, Montana (Index 100), and a rate of twenty-eight cents ($.28) per 100 pounds from Billings, Montana (Index 124), respectively, to Minneapolis and Duluth for the transportation of wheat in carloads over defendant's lines from and to said points.

8. That Section 4 of said Act to Regulate Commerce as amended June 18, 1919, provides as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates sub-[fol. 23] ject to the provisions of this act; but this shall not be construed as authorizing any common carrier within the terms of this act to charge or receive as great compensation for a shorter as for a longer distance; provided, however, that upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section; provided, further, that no rates or charges lawfully existing at the time of the passage of this amendatory act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this act, nor in any case where application shall have been filed before the commission, in accordance with the provisions of this section, until a determination of such application by the commission."

9. That defendant during all the time herein mentioned was not authorized by said Interstate Commerce Commission to charge a lower rate for the transportation of wheat in carloads from Billings, Montana to Minneapolis and Duluth, Minnesota than it contempo-

raneously charged for the transportation of like shipments from Benchland, Montana to Minneapolis, Minnesota and Duluth, Minnesota; but that on or about December 3, 1910, the defendant filed be-
[fol. 24] fore the Interstate Commerce Commission of the United States an application signed and sworn to by W. P. Kenney, its assistant traffic manager, reading as follows:

"The Great Northern Railway Company, through its assistant traffic manager, petitions the Interstate Commerce Commission for authority to continue class and commodity rates for the transportation of all freight as covered in G. N. GFO No. 21600, joint tariff I. C. C. A-3162, and superseding issues not involving basis changes, according to the rate, group or zone adjustments as designated in said tariff or superseding issues under which adjustments the rates via certain routes to or from more distant points are lower than to or from intermediate points," as illustrated by the following:

"Northern Pacific distance St. Paul to Billings, Mont., is 890 miles, first class rate $1.95.

The Great Northern distance St. Paul to Billings, Mont. is 1300 miles. To engage in this traffic we must make the same rate for 1,300 miles as the Northern Pacific do for 890 miles, but in doing so we should not be compelled to pull down all our intermediate rates. In other words, we should not be compelled to make as a natural rate for 1,300 miles the rate which the Northern Pacific makes as a natural rate for 890 miles.

The first class rate from St. Paul to Great Falls is $2.10, this being the norminal rate, distance 1,067 miles.

Omaha to Billings via the C. B. & Q. is 892 miles, Omaha to Billings via C. & N. W., Sioux city and Great Northern 1,547 miles
[fol. 25] first class rate Omaha to Billings $1.95; to Great Falls $2.25; relative adjustment on commodities, etc.

A copy of the tarff mentioned is attached hereto and made a part hereof.

The existing rate adjustments in said tariff have been determined by geographical, commercial and competitive conditions.

This application is based upon the desire of petitioner to meet by direct haul over longer lines or routes competitive conditions created at more distant points by shorter and more direct workable routes."

That, thereafter, the said commission acknowledged receipt of said application by letter reading as follows:

"Washington, December 21, 1910.

Mr. W. P. Kenney,
Asst. Traffic Manager,
Great Northern Railway Company,
St. Paul, Minn.

DEAR SIR:

The application of the Great Northern Railway Company for relief under the Fourth Section of the Act to Regulate Commerce, dated December 3, 1910, your number—has been received.

In referring to this application please give commission's number 827.

Very respectfully (Signed) Edward A. Moseley, Secretary."

Tariff No. G. N. GFO No. 21600 I. C. C. A-3162.

[fol. 26] That said application was pending before the Interstate Commerce Commission during the time herein mentioned and had not been finally determined by said commission.

That said tariff G. N. GFO 21600, referred to in said application contained grain rates from Billings to the eastern terminals referred to in the complaint, and also from said station of Benchland, Montana, to said terminals, of 32 cents per hundred pounds, and was the only Great Northern tariff carrying commodity rates on grain between said points at said time.

That said tariff was superseded effective July 25, 1911, by G. N. GFO 22600, I. C. C. A-3400, which continued the same basis of rates on grain from Billings and other Montana stations, including Benchland, to said terminals.

That said last named tariff was superseded during the year 1912, as to commodities other than grain by Agent Countiss' Joint Tariff I. C. C. 949, and that as to eastbound grain rates said tariff was superseded by G. N. GFO 23721, I. C. C. A-3630, effective January 10, 1913, carrying the same eastbound grain rates above referred to.

That said last named tariff was superseded by G. N. GFO I. C. C. A-3720, effective August 5, 1913, being the tariff above referred to in paragraph Seventh of this stipulation. That the tariffs herein referred to were during the times above referred to the only tariffs carrying commodity rates on grain over the lines of the Great [fol. 27] Northern Railway Company from Billings and Benchland, Montana, to the eastern terminals above referred to.

10. That in Railroad Commissioners of Montana v. B. A. & P. Ry. Co., 31 I. C. C. 641, 652, the Interstate Commerce Commission said:

"The rates from Billings to the twin cities and other points in Minnesota, Wisconsin, and other states are less than the rates concurrently applicable on like traffic from intermediate points in the Great Northern Railway. Defendants claim that these violations of the fourth section are protected by their fourth section application No. 827. At the time this application was filed the rate on wheat from Billings to the twin cities was observed as a maximum at intermediate points on the Great Northern Railway; hence this application cannot be construed as protecting any fourth-section violations now existing as to the rate of wheat from Billings and intermediate points to the territory involved. These violations have been brought about by reason of the fact that in 1913, these carriers reduced the rate from Billings from 32 to 28 cents per 100 pounds, a reduction of 4 cents, without making equal reductions from intermediate stations taking the same rate. No application was filed with the commission for authority to establish the relation of rates this brought about, and such establishment must therefore be con-

sidered as having been made contrary to the rule of the fourth section and without authority from the commission."

[fol. 28] 11. That the differences between the charges collected from the plaintiff by defendant and the charges that would have accrued at the rate of 28 cents per 100 pounds on each of said shipments are correctly set forth in the column entitled "overcharges," in said Exhibits "A" and "B", attached hereto, and aggregate the sum of five hundred ninety and 26/100 dollars ($590.26).

As Conclusions of Law

The court finds that the plaintiff is entitled to judgment against the defendant in the sum of $590.26 with interest at the rate of 6% per annum on each of the several sums set forth in the column entitled "overcharges," in said Exhibits "A" and "B," attached hereto, from the dates upon which each of said several sums were paid by the plaintiff to defendant; together with its costs and disbursements herein.

Let judgment be entered accordingly.

By the Court, John H. Steele, Judge.

A stay of 30 days is granted from and after the date of the filing of this order dated September 23, 1920. S.

McCaull-Dinsmore Co., Minneapolis, Minn.

Station: Benchland, Mont.

Date	Car No.	Int.	Weights	Frt. chges.	Overchges.	Dest.
1913.						
11-6	120152	GN	61,270	183.81	12.25	Duluth.
8-26	207869	"	70,020	210.06	14.00	"
8-26	127071	"	86,500	259.50	17.30	"
9-5	29098	"	81,160	243.48	16.23	"
9-4	121393	"	86,900	260.70	17.38	"
9-5	28516	"	85,030	255.09	17.00	"
9-4	23912	"	85,670	259.71	17.31	"
8-27	220529	"	66,750	200.24	13.35	"
8-27	121246	"	85,950	257.85	17.19	"
8-23	212175	"	65,940	197.82	13.19	"
8-23	205218	"	59,400	178.20	11.88	"
9-4	28150	"	86,000	258.00	17.20	"
8-28	26374	"	85,950	257.85	17.19	"
8-28	33536	"	87,540	262.62	17.51	"
8-22	121636	"	86,180	258.54	17.24	"
8-28	208109	"	65,790	197.37	13.16	"
[fol. 30]						
8-28	16720	"	62,950	188.85	12.59	"
1914.						
7-4	17351	"	61,140	183.42	12.23	"

8-21	22534	"	86,980	260.94	17.39	"
8-23	207475	"	75,470	226.41	15.09	"
8-23	220176	"	65,940	197.82	13.19	"
8-23	122944	"	92,220	276.66	18.44	"
8-23	112372	"	85,160	255.48	17.03	"
8-23	11619	"	86,520	259.56	17.30	"
8-23	14394	"	84,470	253.41	16.89	"
9-3	206240	"	65,710	197.13	10.14	"
8-22	14587	"	87,360	262.08	17.47	"
8-23	211119	"	90,000	240.00	16.00	"

[fol. 31]

EXHIBIT B TO FINDINGS

McCaull-Dinsmore Co., Minneapolis, Minn.

Station: Benchland, Mont.

Date	Car No.	Int.	Weights	Frt. chges.	Overchges.	Dest.
1914.						
8-30	127281	GN	88,000	264.60	17.60	Minneapolis.
8-31	27084	"	88,550	265.65	17.11	"
9-30	111976	"	89,750	269.25	17.95	"
9-3	122021	"	87,860	263.58	17.57	"
8-29	11534	"	84,340	253.02	16.87	"
8-29	10045	"	87,930	263.79	17.59	"
8-29	125457	"	87,850	263.55	17.57	"
8-29	11549	"	85,950	275.85	17.19	"
8-29	123709	"	88,340	265.02	17.67	"

[fol. 32] IN THE DISTRICT COURT OF HENNEPIN COUNTY

(Title of Cause)

STIPULATION FOR SETTLED CASE

It is hereby stipulated by and between the parties to the above entitled action that the foregoing is a full, true and correct transcript of the evidence offered and proceedings had on the trial of the above entitled action, and the said transcript may be signed, certified, settled and allowed as and for a settled case herein, containing all the evidence offered and proceedings had upon the trial of said cause.

Dated this 27th day of January, 1922.

Devaney & Edwards, W. W. Patterson, Attorneys for Plaintiff.
Hoke, Krause & Faegre, F. G. Dorety, Attorneys for Defendant.

IN THE DISTRICT COURT OF HENNEPIN COUNTY

(Title of Cause)

ORDER SETTLING CASE

Having examined the foregoing transcript of evidence, together with such evidence received on the trial of the above entitled action, and having found the same conformable to the truth, the same is, pursuant to the foregoing stipulation of the parties, hereby signed, settled, certified and allowed, as and for a settled case herein, and I hereby certify that the same contains a true and correct transcript of the evidence and proceedings had, and the whole thereof, upon said trial.

Dated this 30th day of January, 1922.

W. W. Bardwell, Judge.

[fol. 33] IN THE DISTRICT COURT OF HENNEPIN COUNTY

(Title of Cause)

NOTICE OF MOTION FOR AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW OR FOR A NEW TRIAL

To the above-named plaintiff and to John P. Devaney and Theodore W. Thompson, its attorneys:

Please take notice, that at a special term of the above named court to be held in the court house of said Hennepin county on Thursday the 9th day of December, 1920, at two o'clock in the afternoon, or as soon thereafter as counsel can be heard, the above named defendant will move the court, as follows:

I

That the findings of fact and conclusions of law heretofore made and filed herein be amended in the following respects, to-wit:

(a) By striking out the words "this stipulation" appearing in the sixth line from the last in paragraph 9, of said findings of fact and by inserting in lieu the words "these findings."

(b) By adding to and inserting in said findings of fact as paragraphs 12 and 13, the following additional findings or words in substance, to-wit:

"12. There is no evidence that any shipments were actually made from Billings, Montana, to the destinations and during the period referred to in these findings, or that any shipments actually moved at the rate of 28 cents per hundred pounds referred to in finding No. [fol. 34] 7, or that the defendant actually assessed or received any charge based upon said rate of 28 cents per hundred pounds.

13. There is no evidence that the plaintiff suffered any loss or damage as a result of the publication by defendant of the rate of 28 cents per hundred pounds from Billings, Montana, referred to in finding No. 7, except the fact that the plaintiff actually paid the charge of 30 cents per hundred pounds mentioned in finding No. 7, or 2 cents per hundred pounds in excess of said 28 cent rate."

(c) By striking out the entire conclusions of law herein and by inserting in lieu thereof a conclusion of law in words, or in substance, as follows to-wit:

"1. The mere publication of the lower rate for the longer distance from Billings, in the absence of evidence that the defendant actually charged and received said rate on shipments actually moved, is not a violation of Section 4, of the Act to Regulate Commerce.

2. In the absence of evidence of actual damage, the plaintiff is not entitled to recover the difference between the rate which it paid and bore, and the lower rate published by defendant for a longer distance.

3. The plaintiff is not entitled to any relief in this action and the action should be dismissed and defendant is entitled to judgment against the plaintiff for its costs and disbursements herein.

4. This court has no jurisdiction to enter judgment against the defendant in this action.

[fol. 35] 5. That plaintiff is not entitled to recover against the defendant and that said defendant is entitled to judgment against plaintiff for its costs and disbursements herein. Let judgment be entered accordingly."

You are further notified that said motion for amendments, as hereinabove set forth, will be made and based upon all the files and

records herein, and upon the transcript of proceedings had at the trial, as the same may be settled by the court herein as and for the settled record of this case, and upon the grounds and for the reasons that the findings which said defendant asked to have stricken are not supported by the evidence and are contrary to law, and that the additional findings of fact and substituted conclusions of law requested by said defendant are required by the evidence and the law applicable to the case.

II

You are further notified that if said motion for amended findings of fact and conclusions of law be denied in whole, or in substance, this defendant will then and there further move the court for a new trial of said cause upon the following grounds and for the following reasons to-wit:

"That the decision of the court is not justified by the evidence and is contrary to law."

You are further notified that said motion will be made and based upon the files and records in this action, and upon the record proposed for settlement at the same time as the same may be settled by the court.

[fol. 36] You are further notified that said defendant will then and there move the court for an order extending the stay herein until a reasonable time after the determination of the foregoing motions.

Dille, Hoke, Krause & Faegre and F. G. Dorety, Attorneys for Defendant, 300 Security Building, Minneapolis Minnesota.

IN THE DISTRICT COURT OF HENNEPIN COUNTY

(Title of Cause)

ORDER DENYING MOTION FOR AMENDED FINDINGS, ETC.

The above entitled matter came on for hearing before the undersigned, one of the judges of said court, upon a motion on the part of the defendant to amend the findings of fact and conclusions of law as set forth in said notice of motion, and in the event that the said motion be denied in whole or in substance, then for a motion on the part of defendant for a new trial, upon the ground and for the reasons set forth in said notice of motion; Mr. F. G. Dorety and Messrs. Dille, Hoke, Krause & Faegre, appearing for defendant in support of said motion, and Mr. W. W. Patterson and Messrs. Devaney & Edwards, appearing for plaintiff in opposition thereto. The court being advised in the premises, upon the arguments presented, upon the briefs filed, and upon all the files, records and proceedings had, it is

Ordered that said motions and each of them be and the same are in all respects denied.

[fol. 37] Dated at Minneapolis, February 9, 1922.

By the Court,

W. W. Bardwell, Judge of District Court.

IN THE DISTRICT COURT OF HENNEPIN COUNTY

(Title of Cause)

JUDGMENT

The above entitled action coming on regularly for trial at the September, 1919, general term of the above entitled court on the 25th day of June, 1920, before one of the judges of said court, without a jury, a jury having been duly waived by both parties, and the court having heard the testimony adduced by the respective parties and duly considered the same, together with the stipulation of facts filed by the parties, and the arguments and briefs of the parties, made, in writing, its findings of fact and conclusions of law filed herein on October 1, 1920, and in which conclusions of law the court found that the plaintiff is entitled to judgment against the defendant in the sum of $590.26 with interest at the rate of six per cent per annum on each of the several sums set forth in the column entitled "overcharges" in the Exhibits "A" and "B" attached to said findings and conclusions, from the dates of payment shown in said exhibits, together with plaintiff's costs and disbursements herein, and ordered judgment to be entered accordingly:

Now, therefore, by virtue of the premises, it is ordered and adjudged that the plaintiff herein have and recover from the defendant herein said sum of $590.26 and said interest which is $288.38, [fol. 38] together with plaintiff's costs and disbursements herein taxed at $14.00, amounting in all to the sum of $892.64.

Dated this 5th day of July, 1922.

Walter A. Ryberg, Clerk of the Above-entitled Court, By Gordon J. Mangan, Deputy.

IN THE DISTRICT COURT OF HENNEPIN COUNTY

(Title of Cause)

NOTICE OF APPEAL

To Devaney & Edwards and W. W. Patterson, attorneys for the above-named plaintiff, and to Walter A. Ryberg, clerk of said District Court:

Please take notice, that the above named defendant, Great Northern Railway Company, appeals to the Supreme Court of the state

of Minnesota, from that certain judgment of the said District Court entered herein, on the 5th day of July, A. D. 1922, and from the whole thereof.

Dated this 6th day of July, A. D. 1922.

F. G. Dorety and Koke, Krause & Faegre, Attorneys for Defendant.

Due and personal service of the within notice of appeal is hereby admitted this day, July 6th, 1922.

Devaney & Edwards, W. W. Patterson, Attorneys for Plaintiff. Walter A. Ryberg, Clerk of District Court, By Geo. H. Hemperley, Deputy.

[fol. 39] In the District Court of Hennepin County

(Title of Cause)

Stipulation Waiving Bond on Appeal

Plaintiff hereby waives the furnishing and filing of bond for costs and supersedeas bond on appeal herein, and hereby stipulates with said defendant that all proceedings herein be stayed pending the final determination of said action.

Dated this 6th day of July, 1922.

Devaney & Edwards, W. W. Patterson, Attorneys for Plaintiff; F. G. Dorety and Hoke, Kause & Faegre, Attorneys for Defendant.

[fol. 40] STATE OF MINNESOTA:

SUPREME COURT

1922

23141

[Title omitted]

APPELLANT'S BRIEF

Hoke, Krause & Faegre, 300 Security Bldg., Minneapolis, Minnesota; F. G. Dorety, R. J. Hagman, 1120 Great Northern Bldg., St. Paul, Minnesota, Attorneys for Appellant.

[fol. 41]

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[fol. 44] [Title omitted]

Statement of the Case

This is an appeal from a judgment entered in the District Court for the Fourth Judicial District against appellant, Great Northern Railway Company, in the sum of $892.64 in favor of respondent, McCaull-Dinsmore Company, in an action brought to recover freight charges collected in alleged violation of the long and short haul clause of Section 4 of the Interstate Commerce Act.

There are no disputed facts in this case, the cause having been submitted for trial upon a stipulation of facts (Rec. p. 8). The [fol. 45] errors complained of by appellant are erroneous conclusions of law made by the court from those facts. The facts so far as necessary to present the questions involved in this appeal are:

Appellant is a common carrier owning and operating a railway extending from Duluth and Minneapolis westward to the Pacific Coast with a branch line extending from Havre, Montana, on its main line southerly through Benchland to Billings, Montana. The distance from Billings to Minneapolis is 1,253 miles and to Duluth 1,291 miles. Benchland is located on appellant's line 152 miles north of Billings and consequently that many miles less distant than Billings from Minneapolis and Duluth over the same route. Shipments from Billings to Minneapolis and Duluth pass through Benchland.

For a number of years the appellant's tariff rate for the transporta-

tion of wheat was 32¢ per cwt. for both Billings and Benchland to Minneapolis and Duluth. On August 5, 1913, appellant duly filed and published a tariff naming a rate on wheat to said terminals of 28¢ from Billings and 30¢ from the less distant point of Benchland. Thus Benchland obtained a reduction in its rate of 2¢ per cwt. Billings, although more distant from the terminals than Benchland, was given a reduction of 4¢ per cwt., making its rate 2¢ lower than the new rate from Benchland, for the reason that the Northern Pacific Railway Company operated a more direct line between Min- [fol. 46] neapolis and Billings, a distance of 882 miles—approximately 371 miles shorter than the appellant's line, and published a rate on wheat from Billings to Minneapolis of 28¢. For the purpose of enabling it to participate in the transportation of wheat from Billings to Minneapolis in competition with the shorter and more direct line of the Northern Pacific, the appellant published the 28¢ rate from Billings referred to above, but that competition did not exist as to Benchland, which is a local point on the Great Northern, and appellant was not compelled for business reasons to reduce the rate from that point below its normal level. The same situation existed with reference to the rates to Duluth. Section 4 of the Interstate Commerce Act, as amended June 18, 1910, reads in part as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance.

* * * * * * *

Provided, however, that upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be [fol. 47] relieved from the operation of this section.

* * * * * * *

And provided further, that rates, fares, or charges existing at the time of the passage of this amendatory Act by virtue of orders of the Commission or as to which application has theretofore been filed with the Commission and not yet acted upon, shall not be required to be changed by reason of the provisions of this section until the further order of or a determination by the Commission. * * *"

As appears from the stipulation of facts (Rec. pp. 12 and 13), the appellant on December 3, 1910, had petitioned the Commission "for authority to continue class and commodity rates for the trans-

portation of all freight" as covered by certain tariffs "under which adjustments the rates via certain routes to or from more distant points are lower than to or from intermediate points." The situation intended to be covered by this petition was illustrated by reference to the St. Paul to Billings first class rate as compared with a higher rate to Great Falls, which is an intermediate point (Rec. p. 13). This application was still pending before the Commission and undetermined at the time the shipments here in question moved (Rec. p. 14). The tariff referred to in the application covered grain rates, and was the only Great Northern tariff carrying commodity rates on grain (Rec. p. 15). The Great Northern Railway Company believed and claimed that, under the last proviso of the Fourth Section quoted above, the Fourth Section violations com- [fol. 48] plained of in this case were protected by the said application, and this belief continued until the Commission decided otherwise in the case of Railroad Commissioners of Montana vs. Butte, Anaconda & Pacific, 31 I. C. C. 641, which was decided October 5, 1914. In that case the Commission held that, since the rates here in question had been established by a tariff published subsequent to the said application, they would not be considered as covered by the application, and that consequently the Fourth Section violations should be removed (31 I. C. C. 652). Thereupon the Great Northern promptly cancelled the lower rate to Billings, and thus removed the Fourth Section violation.

While the lower rate to Billings remained in force and during the period from August 22, 1913, to September 3, 1914, respondent shipped 37 carloads of wheat over appellant's line from Benchland to Minneapolis and Duluth. Appellant collected and respondent paid for this transportation at the rate of 30¢ per cwt., which was named in the tariffs as the rate on wheat from Benchland.

Just before the expiration of six years after these shipments moved, that is, in the year 1920, respondent instituted this action in the District Court to recover the difference of 2¢ per cwt. between the 30¢ rate it paid from Benchland and the 28¢ rate published from Billings.

The lower court found that the collection of the two cents in question was unlawful and that respondent by reason of this fact alone [fol. 49] was entitled to recover the same, regardless of whether any competitor had shipped any grain from Billings over the longer route at the lower rate, and regardless of whether respondent had been damaged in any way by the fact that the lower rate had been published for the longer haul.

There is no claim or evidence that the 30¢ rate from Benchland paid by respondent was unreasonable or excessive in itself, or that respondent would have been entitled to a lower rate than 30¢ had the appellant not published a 28¢ rate from the competitive point of Billings. On the contrary, the fact is that after the lower rate from Billings was cancelled the rate from Benchland continued to be 30¢, and the respondent continued to make shipments thereunder without any complaint. The 28¢ rate which was made by the Northern Pacific from Billings to Minneapolis, applicable over

its short line of 882 miles, would presumably have been the normal charge for the same length of haul over the Great Northern. As the distance from St. Paul over the Great Northern increased the rate would naturally increase and did increase until it reached 30¢ at Benchland. There is no question but that this was perfectly proper in all respects, except for the one fact that when it reached the still more distant point of Billings the appellant published the lower 28¢ rate in order to meet the Northern Pacific charge.

We want to emphasize the fact that this is not the usual case of a Fourth Section violation where the higher intermediate rates is [fol. 50] put in through oversight and later reduced to make a proper adjustment. On the contrary, it is a case where the Benchland rate was intentionally and deliberately maintained on a normal basis, both before, during and after the time when the tariff in question was effective. Instead of being a case where the intermediate rate was an oversight, it is a case where the lower rate for the longer haul was based upon a mistaken assumption, that is, upon the supposition that proper application for relief had been made. When the mistake in the assumption was discovered the higher intermediate rate was not reduced, but the lower rate for the longer distance was increased.

[fol. 51]

Assignments of Error

I

The lower court erred in ordering judgment for respondent for the following reasons:

(a) The undisputed evidence showed that the court was without jurisdiction.

(b) The undisputed evidence showed that there was no violation of the long and short haul clause of the Fourth Section of the Interstate Commerce Act.

(c) There was no evidence that respondent suffered any injury or was damaged in any way by reason of the publication by appellant in its tariffs of a higher rate from Benchland than from the more distant point of Billings.

II

The court erred in denying appellant's motion to amend the findings of fact made by the court by adding thereto findings in substantially the following words:

"12. There is no evidence that any shipments were actually made from Billings, Montana, to the destinations and during the period referred to in these findings, or that any shipments actually moved

at the rate of 28 cents per hundred pounds referred to in finding No. 7, or that the defendant actually assessed or received any charge based upon said rate of 28 cents per hundred pounds.

[fol. 52] "13. There is no evidence that the plaintiff suffered any loss or damage as a result of the publication by defendant of the rate of 28 cents per hundred pounds from Billings, Montana, referred to in finding No. 7, except the fact that the plaintiff actually paid the charge of 30 cents per hundred pounds mentioned in finding No. 7, or 2 cents per hundred pounds in excess of said 28 cent rate."

III

The court erred in denying appellant's motion to strike out the entire conclusions of law made by the court and to insert in lieu thereof a conclusion of law in words or substance as follows:

"1. The mere publication of the lower rate for the longer distance from Billings, in the absence of evidence that the defendant actually charged and received said rate on shipments actually moved, is not a violation of Section 4, of the Act to Regulate Commerce.

"2. In the absence of evidence of actual damage, the plaintiff is not entitled to recover the difference between the rate which it paid and bore, and the lower rate published by defendant for a longer distance.

"3. The plaintiff is not entitled to any relief in this action and the action should be dismissed and defendant is entitled to judgment against the plaintiff for its costs and disbursements herein.

"4. This court has no jurisdiction to enter judgment against the defendant in this action.

"5. That plaintiff is not entitled to recover against the defendant and that said defendant is entitled to judgment against plaintiff for [fol. 53] its costs and disbursements herein. Let judgment be entered accordingly."

IV

The Court erred in failing to dismiss the complaint for the reason that any cause of action which plaintiff may have is barred by the statute of limitations.

[fol. 54] ARGUMENT

We call attention at the outset to the fact that the court's jurisdiction and the rights and liabilities of the parties to this proceeding must be determined exclusively by the federal statutes and by the common law principles accepted and enforced by the federal courts, as this court has held in the case of Carbic Mfg. Co. v. Western Express Co., 149 Minn. 467, where it is said:

"The shipment was in interstate commerce. That interstate commerce is now governed exclusively by the federal statutes and 'by the common-law principles accepted and enforced by the federal courts' has become too thoroughly established to require the citation of authorities. Consequently we must look to, and follow, the decision of the federal courts in so far as they have determined the questions which arise in respect to such commerce."

I

Plaintiff's action is barred by the statute of limitations.

Section 16 of the Interstate Commerce Act as it existed prior to the amendment made February 28, 1920, read in part as follows:

"* * * All complaints for the recovery of damages shall be filed with the commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement [fol. 55] of an order for the payment of money shall be filed in the circuit court or state court within one year from the date of the order, and not after."

In the case of Phillips v. Grand Trunk Western Railway Company, 236 U. S. 662, 35 Sup. Ct. 444, 59 L. Ed. 774, the Supreme Court construed this provision of the statute as fixing a limitation of two years for the commencement of an action to recover freight charges collected in violation of the Interstate Commerce Act when the action is brought in court as well as when brought before the Interstate Commerce Commission. This was an action instituted in the Circuit Court of the United States for the Eastern District of Michigan by a shipper for the recovery of an overcharge in connection with numerous interstate shipments of lumber. At page 666 the Court says:

"But neither proceedings begun by other shippers, nor findings of unreasonableness and orders issued thereon by the Commission, would save the rights of those who disregarded the requirements of the Hepburn Amendment, that, 'all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court within one year from the date of the order, and not after; provided, that claims accrued prior to the passage of this act may be presented within one year.' 34 Stat. 586.

[fol. 56] "In the present case the overcharges were made and paid prior to August, 1904. The present suit was brought May 9, 1909,—less than two years after the validity of the Commission's order was sustained by the Supreme Court,—but more than one year after the passage of the Hepburn Amendment, and more than four years after the plaintiff's cause of action arose.

"3. It is argued, however, that under the Conformity Act (R. S. 914), the case is to be governed by the Michigan practice, which does not permit a defendant to take advantage of the statute of limitations by a general demurrer to the declaration. But that rule does not apply to a cause of action arising under a statute which indicates its purpose to prevent suits on delayed claims, by the provision that all complaints for damages should be filed within two years and not after. Under such a statute the lapse of time not only bars the remedy, but destroys the liability (Finn v. United States, 123 U. S. 227, 232) *whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction.* This will more distinctly appear by considering the requirements of uniformity which, in this as in so many other instances, must be borne in mind in construing the Commerce Act. The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law and to treat all shippers alike would have made it illegal for the carriers, either by silence or by express waiver, to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period. *To have one period of* [fol. 57] *limitation where the complaint is filed before the Commission and the varying periods of limitation of the different states, where a suit was brought in a court of competent jurisdiction;* or to permit a railroad company to plead the statute of limitations as against some and to waive it as against others *would be to prefer some and discriminate against others in violation of the terms of the Commerce Act which forbids all devices by which such results may be accomplished.* The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the waiver of defenses open to the carrier. The Railroad Company therefore was bound to claim the benefit of the statute here and could do so here by general demurrer. For when it appeared that the complaint had not been filed within the time required by the statute it was evident, as matter of law, that the plaintiff had no cause of action. The carrier not being liable to the plaintiff for overcharges collected more than four years prior to the bringing of this suit, it was proper to dismiss the action." (Italics ours.)

As plaintiff's cause of action is predicated on a violation of the long and short haul clause of the Fourth Section of the Interstate Commerce Act, and was not instituted until almost six years after the cause of action accrued, under the holding of the Supreme Court in the Phillips case the action must be dismissed as barred by the statute of limitations requiring such actions to be commenced within two years.

[fol. 58] II

The trial court was without jurisdiction and the action should be dismissed for that reason.

It is our contention that in order to permit of recovery in this case the Court must have jurisdiction to determine not only that the 30¢ rate from Benchland fixed by appellant's tariff and paid by respondent was unlawful before it can give respondent relief, but must also have jurisdiction to determine what was a lawful and proper rate, for obviously the measure of the respondent's relief must be limited by that. We contend that the trial court was without jurisdiction to determine either of these questions for the reason that they were administrative questions exclusively, within the jurisdiction of the Interstate Commerce Commission.

Congress, by the Interstate Commerce Act approved February 4, 1887, and the numerous amendments thereto, has undertaken an elaborate regulation and control of common carriers engaged in interstate commerce. Section 6 of that Act compels carriers to state all their rates, rules and regulations in printed tariffs which must be filed with the Interstate Commerce Commission and published, and makes it unlawful for a carrier to transport a shipment between two stations unless the rate upon which it will be transported is first so filed and published. The carrier primarily has the right and it is its duty to fix the charges for which it will perform transportaiton [fol. 59] services and when such rates are named in tariffs which are filed with the Commission they become the lawful rates, and neither the shipper nor the carrier may depart from those rates without subjecting themselves to a penalty. Only the Interstate Commerce Commission has the power to declare tariff rates unlawful and fix the lawful rate. But in order that the rates fixed by the carrier in its tariff may be found lawful when attacked before the Commission the carrier must observe several cardinal principles in establishing them. These principles are contained in Sections 1, 2, 3 and 4 of the Interstate Commerce Act, and are customarily refered to by traffic men and the Interstate Commerce Commission by the numbers of the sections of the Act containing them. These sections, at the time plaintiff's shipments moved, read as follows:

"Sec. 1. * * * All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful * * *."

"Sec. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or [fol. 60] property, subject to the provisions of this act, then it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier

shall be deemed guilty of unjust discrimination which is hereby prohibited and declared to be unlawful * * *."

"Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever * * *."

"Sec. 4. That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this Act; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a [fol. 61] longer distance: Provided, however, That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: Provided, further, That no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the commission, in accordance with the provisions of this section, until a determination of such application by the commission * * *."

The United States Supreme Court in the familiar case of Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 Law Ed. 553, held that since the enactment of the Interstate Commerce Act courts are without power to determine whether or not a rate established by a carrier in accordance with the provisions of the Act is unjust or unreasonable, notwithstanding section 22 of the act providing that "nothing in this act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies," for the [fol. 62] reason that such power is vested by the act exclusively in the Interstate Commerce Commission. The court found that if this were not so the purpose of the act would be defeated. Instead of obtaining uniformity through the action of a single body skilled in determining rate questions different courts and juries throughout the country would render conflicting judgments and verdicts which would result in preferences and discriminations, would lead to fa-

voritism and the enforcement of one rate in one jurisdiction and a different one in another.

In the later case of Robinson v. B. & O. R. Co., 222 U. S. 506, 32 Sup. Ct. 114, 56 Law Ed. 288, it was held that the courts were equally without jurisdiction to determine whether or not a rate established by a carrier in accordance with the Act was unjustly discriminatory. The principle is now unquestioned that no court has the power to determine whether or not a rate duly published and filed as required by the Act is either unreasonable, unjustly discriminatory or unduly prejudicial, and as a correlative, that no court has the power to determine what would have been a reasonable, non-discriminatory and non-prejudicial rate, for a shipment theretofore made. The Interstate Commerce Commission was established for the purpose of determining the lawfulness of freight rates and empowered to award reparation to shippers from whom it finds that unlawful rates have been exacted by carriers.

[fol. 63] It is apparent from the provisions of the Interstate Commerce Act, quoted above, that in order to be lawful a rate must not be unreasonable in violation of Section 1, must not be unjustly discriminatory in violation of Section 2, must not be unduly preferential or prejudicial in violation of Section 3, and must not violate the long and short haul clause of Section 4. It cannot be said that a rate is lawful merely because it does not contravene the Fourth Section. It must not be violative of Sections 1, 2 and 3 as well, in order to be a lawful rate. A rate of 28¢ from Benchland would comport with the Fourth Section and at the same time the Interstate Commerce Commission might find that that rate was intrinsically unreasonable in violation of Section 1, or that it was unjustly discriminatory in violation of Section 2, or unduly preferential of Benchland, or unduly prejudicial to Great Falls or some other locality either north or south of Benchland on appellant's line, in violation of Section 3. The court has no jurisdiction to determine that 28¢ was the lawful rate from Benchland in that it conformed to the requirements of Sections 1, 2 and 3 of the Act, and since a rate may be lawful so far as Section 4 is concerned and at the same time unlawful so far as Sections 1, 2 or 3 are concerned, it is apparent that the court had no power to determine that 28¢, or any other rate, was the lawful rate from Benchland, for to do so necessarily and unavoidably involves a determination that the rate found lawful not only satisfied the Fourth Section, but was reasonable, non-discriminatory and non-
[fol. 64] prejudicial, and only the Interstate Commission has the power to make such a finding.

That the determination of a lawful rate depends upon more than an observance of the Fourth Section is illustrated by the language of the United States Supreme Court in the Intermountain Rate Case, 234 U. S. 476, 34 Sup. Ct. 986, 58 Law Ed. 1408. At page 485 the Court says, in discussing the Fourth Section as amended June 18, 1910:

"From the failure to insert any word in the amendment tending to exclude the operation of competition as adequate under proper

circumstances to justify the awarding of relief from the long and short haul clause *and there being nothing which minimizes or changes the application of the preference and discrimination clauses of the second and third sections,* it follows that in substance the amendment intrinsically states no new rule or principle, but simply shifts the powers conferred by the section as it originally stood; that is, it takes from the carriers the deposit of public power previously lodged in them and vests it in the Commission as a primary instead of a reviewing function. In other words, the elements of judgment or so to speak the system of law by which judgment is to be controlled remains unchanged, but a different tribunal is created for the enforcement of the existing law. This being true, as we think it plainly is, the situation under the amendment is this: Power in the carrier primarily to meet competitive conditions in any point of view by charging a lesser rate for a longer than for a shorter haul has ceased to exist because to do so, in the absence of some authority, *would not* [fol. 65] *only be inimical to the provision of the fourth section, but would be in conflict with the preference and discrimination clauses of the second and third section.* But while the public power, so to speak, previously lodged in the carrier is thus withdrawn and reposed in the Commission the right of carriers to seek and obtain under authorized circumstances the sanction of the Commission to charge a lower rate for a longer than for a shorter haul because of competition or for other adequate reasons is expressly preserved, and if not is in any event by necessary implication granted. And as a correlative the authority of the Commission to grant on request the right sought is made by the statute to depend upon the facts established and the judgment of that body in the exercise of a sound legal discrimination as to whether the *request should be granted compatibly with a due consideration of the private and public interests concerned and in view of the preference and discrimination clauses of the second and third sections.*" (Italics ours.)

Section 4 makes it "unlawful for any common carrier * * * to charge or receive any greater compensation in the aggregate for the transportation of * * * like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance." The sole effect of this language is to make the higher rate from the nearer point unlawful with the result that the carrier subjects itself [fol. 66] to a penalty for violating the act. To say that this language automatically makes the published rate from the more distant point the lawful rate from the nearer point contrary to the express wording of the tariff, is to read something in to the Act that is not there. Furthermore, to read such an implication into the Fourth Section would be inconsistent with the theory of the entire Interstate Commerce Act. After Congress specifically condemns a rate that is either unjust, unreasonable, unduly discriminatory or unduly preferential, it is absurd to say that it intended by the Fourth Section that when a carrier, contrary to law, publishes a higher rate for a shorter than for a longer haul that the rate from the more distant

point automatically and conclusively becomes the lawful rate from the nearer point, immune from the operation of Sections 1, 2 and 3 of the Act. Congress by the Fourth Section merely took away from the carriers the power to establish, without first obtaining permission from the Commission, higher rates for shorter than for longer hauls, and did not withdraw from the Commission its exclusive power to determine what the lawful rate from the nearer point should be in case the carrier disregards the provisions of the Fourth Section.

Section 6 of the Interstate Commerce Act provides in part as follows:

"No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as de-
[fol. 67] fined in this Act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

The only rate from Benchland named in any of appellant's tariffs was 30¢. If that rate is unlawful under the Fourth Section the result is that no lawful rate from Benchland existed, as the only way of establishing a lawful rate is to file and publish a tariff naming the rate. We have then, if respondent's argument is sound, a case where the appellant violated the provisions of Section 6 of the Act quoted above, in that it transported shipments between Benchland and Minneapolis without having a lawful tariff rate therefor. Sections 13, 15 and 16 of the Act provide that any person complaining of "anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof," may apply to the Commission by petition, and the [fol. 68] Commission is empowered, after investigation, either after complaint by a shipper or upon its own motion, in case it determines that any complainant "is entitled to an award of damages under the provisions of this Act for a violation thereof" to "make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named." The appellant's action in transporting a shipment without having a lawfully published tariff rate therefor, if the 30¢ rate was unlawful as contended by respondent, is a violation of the Interstate Commerce Act for which the Commission may award reparation, and the Commission has in such cases determined what would have been a lawful rate for the transportation in view of Sections 1, 2, 3 and 4 of the Act. See American Smelting & Refining Co. v. L. V. R. R. Co., 56 I. C. C. 195, 201.

It is thus apparent that the respondent was not barred from obtaining any relief it is entitled to by applying to the Interstate Commerce Commission, merely because it paid charges for transportation for which there was no tariff rate, as distinguished from a case where a shipper pays a tariff rate which is afterwards found by the Commission to have been unreasonable or discriminatory. The courts have no more jurisdiction to determine the administrative question of what would have been a lawful rate for a transportation service rendered without first publishing a rate therefor as required by Section 6, than they have to determine the administrative question of whether a published rate is reasonable and non-discriminatory. As [fol. 69] we have already stated, when the court attempted to fix 28¢ in this case as the lawful rate from Benchland, the effect of its action was necessarily and unavoidably to determine that that rate is lawful in view of Sections 1, 2 and 3, as well as in view of Section 4, because no rate can be lawful unless it satisfies the requirements of Sections 1, 2 and 3 as well as Section 4. If this case was pending before the Interstate Commerce Commission, where it should have been brought instead of before the court, the Commission in determining what the lawful rate from Benchland was certainly would not merely select a rate that would not be higher from Benchland than from Billings and establish that as the lawful rate from Benchland, without considering whether that rate also would be reasonable, non-discriminatory and non-prejudicial to shippers and localities in competition with Benchland as required by Sections 1, 2 and 3. Yet that is the very thing that the court below attempted to do when it fixed 28¢ as the lawful rate from Benchland.

In the case of Wickwire Steel Co. v. N. Y. C. & H. R. R. Co., 30 I. C. C. 415, 420, 422, the Commission said:

"Even though the Commission in the case of an increased rate always is to consider whether it is just and reasonable, it is not precluded from considering the rate from other viewpoints, such as that of its preferential or discriminatory character. In view of the general import of the language of the paragraph taken as a whole, to argue [fol. 70] the contrary would seem to be to torture the plain meaning of the act into a restricted sense in nowise necessarily inferable from its terms.

* * * * * * *

"Under this conclusion that the proposed rates were unreasonably high, manifestly the fact that they had been published to remove a rate factor indicating a violation of the fourth section could not be accepted as a justification for the change."

Furthermore, the question of whether or not the 30¢ rate published in the tariff as applicable from Benchland and paid by respondent was in fact violative of Section 4, is in itself an administrative question which only the Commission can determine. To declare that rate unlawful would require a finding as to whether or not the lower rate from a longer distance was for a "like kind of prop-

erty," whether it was "over the same line or route in the same direction," whether the shorter distance was "included within the longer distance," whether the carrier actually charged or received the lower rate for the longer distance, whether the rate in question was existing "at the time of the passage of this amendatory act," and whether it was properly protected by an application to the Commission. These are also administrative questions to be determined before it can be said that the 30¢ rate was an unlawful rate.

Moreover, if any court has jurisdiction in this particular case the [fol. 71] jurisdiction of the Federal court is exclusive. Section 9 of the Interstate Commerce Act provides in part:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may *either make complaint to the Commission as hereinafter provided for, or may bring suit* in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, *in any district or circuit court of the United States of competent jurisdiction;* but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt." (Italics ours.)

And Section 22 provides in part:

"And nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies: Provided, That no pending litigation shall in any way be affected by this Act."

At common law the shipper has a remedy in court for the refund of rates which were per se unreasonable, but if the rate charged was reasonable he had no common law remedy because of the fact that a lower rate was charged for a longer distance. This right is purely a creature of the statute. However, it is immaterial for the purpose of determining the jurisdiction whether respondent in this case could recover under the common law, as its cause of action is predicated [fol. 72] upon the Fourth Section of the Interstate Commerce Act. Section 9 clearly states that to recover damages for the violation of the act suit must be filed either with the Interstate Commerce Commission or with the United States District Court. No state court, therefore, has jurisdiction of this action.

Fourth Section.

In Darnell v. Illinois Central, 190 Fed. 656, the first head note reads as follows:

"Jurisdiction of a claim for damages against an interstate carrier because of excessive rates charged and collected by it from the claimant is expressly limited by Interstate Commerce Act, Feb. 4, 1887, c. 104, sec. 9, 24 Stat. 382 (U. S. Comp. St. 1901, p. 3159) to the Interstate Commerce Commission or a District or Circuit Court of the United States, and the provision of section 16 of the act, as amended by Act June 18, 1910, c. 309, sec. 13, 36 Stat. 554,

extending such jurisdiction to the state courts, applies, by its terms, only to claims which have been previously determined by the commission, and on which it has made awards which have not been compiled with."

In Siggins v. Chicago & N. W. Ry. Co., 140 N. W. 1128, the second head note reads as follows:

"Under Interstate Commerce Act (Act Feb. 4, 1887, c. 104, sec. 9, 24 Stat. 382 [U. S. Comp. St. 1901, p. 3159]), authorizing complaint to the Interstate Commerce Commission or suit in a federal District or Circuit Court to enforce liability against an interstate carrier, the commission and the federal courts have exclusive authority of all claims for overcharges on interstate shipments, whether [fol. 73] they grow out of an excessive rate or out of misrouting notwithstanding section 2, which provides that nothing in the act shall abridge existing remedies."

Therefore, while we deny that any court, either state or federal, has jurisdiction in this case, it seems clear that even if we were wrong in this, and if there is a remedy in court, the Federal courts have exclusive jurisdiction.

III

No Violation of Section 4 Has Been Shown.

Assuming, for the purpose of this argument, that the court has jurisdiction of this action, it must be dismissed for the reason that respondent has not shown that the collection of the 30¢ rate from Benchland was in violation of the Fourth Section. Section 4 makes it unlawful to "charge or receive" more for a shorter than for a longer haul. All of the evidence is contained in the stipulation found at page 9 et seq. of the Record. There is no evidence that a single shipment of wheat was carried by appellant from Billings to Minneapolis or Duluth on the 28¢ rate published from Billings during the period respondent's shipments moved from Benchland or at any other time. The evidence is merely:

"Seventh. That defendant's *tariff* I. C. C. No. A3720 published and filed with the Interstate Commerce Commission effective Au- [fol. 74] gust 5, 1913, and in effect during all the time herein mentioned, *named* a rate of thirty cents ($.30) per 100 pounds from Benchland, Montana, (Index 100), and *a rate of twenty-eight cents* ($.28) per 100 pounds from *Billings, Montana* (Index 124), respectively, to Minneapolis and Duluth for the transportation of wheat in carloads over defendant's lines from and to said points." (Italics ours.)

In the absence of evidence that any shipments ever moved from Billings it cannot be said that appellant either "charged" or "received" a greater compensation for a shorter than for a longer haul. This follows not only from a consideration of the meaning of the

words "charged" and "received," but from a consideration of the purpose sought to be accomplished by the fourth section.

The evil aimed at by the Fourth Section is merely a phase of the unjust discrimination and undue prejudice prohibited by Sections 2 and 3. If the rate over the shorter distance is not shown to be unreasonable in itself a shipper is in no way discriminated against or damaged by the mere fact that a lower rate is published for a longer than a shorter haul. In order to be discriminated against respondent's competitors must actually have made shipments on the more favorable rate for the longer distance to respondent's damage. It was undoubtedly for this reason that Congress made the charging or receiving of a higher rate for a shorter than for a longer distance the test of illegality, rather than the mere naming in a tariff of a lower rate for a longer distance, as in our case.

[fol. 75] In the case of Missouri & Kansas Shippers' Association v. M. K. & T. Ry. Co., 12 I. C. C. 483, the Interstate Commerce Commission said with reference to such a situation as we have here:

"Although it is clear that the Class C rate was a paper rate only, so far as hay was concerned, and that the breach by defendant of the provisions of section 4 was therefore purely technical and in no sense substantial, the object of this petition is to take advantage of the situation and to secure reparation on shipments that moved to Kansas City while the defendant inadvertently permitted its tariffs to remain in that condition.

"While its procedure is to some extent judicial in nature, the Commission is essentially an administrative body; and in the adjustment of contentions proceedings of this kind it ought to examine into the real substance of the matter unembarrassed by considerations that are purely technical. Looking at the complaint from this point of view, it seems to us wholly without merit. We are unable to accept a merely theoretical or paper rate, for the longer haul, that has not been used and was unknown either to the defendant or to the complainant, until casually discovered after it had been the published rate for some years, as affording a just basis for an order for reparation on shipments made to an intermediate point at a slightly higher rate. This view of the matter is supported by the uncontradicted evidence of the defendant, tending to show that the class C rate of 10 cents to St. Joseph was not a compensatory rate on hay, and by the complete failure of the complainant to show [fol. 76] that the rate to Kansas City was in itself excessive. That issue although raised in the complaint was abandoned on the hearing."

IV

To recover for a violation of the fourth section respondent must prove that it was damaged.

The purpose and effect of the long and short haul clause of the Fourth Section will be understood more clearly after a consideration

of Sections 1, 2 and 3. These four sections determine the character and quality of rates which carriers are allowed to charge. Section 1 provides "that all charges shall be just and reasonable." As construed by the decisions, this means reasonable per se, that is, in and of themselves and without relation to or comparison with other rates. In other words, to be in accord with the first section, rates must not be out of proportion to the expense to the carrier performing the service. There must not be an undue profit to the carrier. The rates must not be exorbitant, nor more than the service is actually worth. If a rate is too high in this sense it is unreasonable and, therefore, "unlawful."

The measure of damages in a case where a shipper has paid an unreasonable rate was settled by the United States Supreme Court in the case of Southern Pacific Co. v. Darnell-Taenzer Co., 245 U. S. 531, 38 Sup. Ct. 186, 62 Law Ed. 451. That was an action to re- [fol. 77] cover reparation because of the collection of a rate which the Interstate Commerce Commission had previously found to be unreasonable in violation of Section 1 of the Act. The court held that where an excessive charge was collected by a carrier "plaintiffs have paid cash out of pocket that should not be required of them, and there is no question as to the amount of the proximate loss" which is the difference between the amount of the excessive rate paid and the reasonable rate. A carrier is entitled to charge only a reasonable rate and when it collects a greater sum the shipper has paid for something he did not receive and is entitled to recover the excess amount paid, it following as a matter of law that he has been damaged to that extent.

A violation of either Section 2, 3 or 4 of the Act presents a different question and a different rule of damages applies. Section 2 provides that a carrier which charges one person a greater or less compensation for any service rendered than it charges any other person for a like and contemporaneous service under substantially similar circumstances and conditions shall be guilty of unjust discrimination, which is prohibited and declared to be unlawful. Section 3 provides that it shall be unlawful to give any undue or unreasonable preference or advantage to any particular person, locality or description of traffic in any respect whatsoever, or to subject any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. As the Supreme Court said in the case of I. C. C. v. B. & O. R. R. [fol. 78] 145 U. S. 263, 277, "a charge may be perfectly reasonable under Section 1, and yet may create an unjust discrimination or an unreasonable preference under Sections 2 and 3." A rate of 10¢ from A to X which is reasonable, may be lawful today, but become unlawful tomorrow because of the publication and collection of an 8¢ rate from B to X, resulting in undue prejudice against a shipper at A or the locality of A; and the following day the 10¢ rate may again become lawful because of the cancellation of the lower rate from B. Again, the 10¢ rate from A to X may be lawful today and unlawful tomorrow because of the establishment and collection of an 8¢ rate from A to X on a competing commodity, or because of the publica-

tion of an 8¢ rate on the same commodity applicable from A to X when made by a particular shipper. In other words, a rate may be inherently reasonable so that a shipper has not paid an excessive charge and has paid no more than the service is worth to him, but because of the carrier's act in establishing other rates the shipper who pays only the per se reasonable rate is injured for the reason that those other rates result in an unjust discrimination or undue prejudice in violation of Sections 2 or 3. The difference between Section 1 on the one hand and Sections 2 and 3 on the other is that a rate unlawful under Section 1 is unlawful without reference to or comparison with any other rate. It is bad because it is too high in and of itself, whereas rates can only be unlawful under Sections 2 [fol. 79] and 3 by comparison with some other rates.

The respondent's claim is that it can recover here merely by showing that the appellant collected an "unlawful" rate. It is apparent from what we have just been saying that the rate may be "unlawful" under the Act in two very different senses. We now desire to point out that the "unlawfulness" under Section 4 is of the second kind; that is, it is due, not to any inherent vice in the rate itself, but is due to and dependent upon some other rate. In other words, Section 4 is similar in its nature to Sections 2 and 3 and not to Section 1.

A published rate of 30¢ from Benchland (which the court must presume reasonable until declared otherwise by the Commission) is not unlawful if the rate from the more distant point of Billings, for instance, is also 30¢ or more, but in view of the Fourth Section, becomes unlawful only when through an act of the carrier the Billings rate is reduced below 30¢. A shipper from Benchland who pays the 30¢ rate today when 28¢ is the rate from Billings in violation of the Fourth Section, is no more injured by reason of the 28¢ rate from Billings than he was yesterday when he paid the same 30¢ from Benchland which was lawful because the rate from Billings was 30¢ or more, except under one condition. The only possible condition under which respondent could be injured by reason of paying the 30¢ rate from Benchland on the day when the rate from Billings was 28¢ would be where another shipper actually made [fol. 80] shipments from Billings on the 28¢ rate under circumstances that resulted in pecuniary damage to respondent in the way of business losses or shrinkage of profits, since in both cases he has paid no more than an inherently reasonable rate. The existence of a lower rate from Billings is a thing of utter inconsequence to the shipper from Benchland, save and except under one contingency, viz.: when another person makes shipments from Billings under the more favorable rate resulting in pecuniary damage to the shipper from Benchland.

The difference between these two kinds of unlawfulness, one of which is inherent in the rate itself, and the other of which depends upon a comparison with some other rate, has been recognized by the courts. In considering questions of recovery of resulting damage, we have seen that in the Darnell-Taenzer case, supra, the Supreme Court of the United States held that, in a case of inherent

unlawfulness under Section 1, the mere fact that the shipper had paid more than a reasonable amount would entitle him to recover the excess, even though he had passed it on to the consumer and had not in fact suffered the loss himself. Mere unlawfulness, of the kind arising under Section 1, is sufficient to justify recovery, without any proof of damage. But when the question of the rule of damage to be applied in a discrimination or undue prejudice case came before the Supreme Court, it declared that the rule of the Darnell-Taenzer case was inapplicable, since a discrimination may exist without injury to or effect upon the shipper until another [fol. 81] shipper actually makes a shipment on the more favorable rate and thereby obtains an advantage; that the existence of such a situation must be proved affirmatively by a plaintiff; and that the law will not presume damage merely from a showing of discrimination or undue prejudice. This principle was established by the United States Supreme Court in the case of Pennsylvania R. Co. v. International Coal Mining Co., 230 U. S. 184, 33 Sup. Ct. 893, 57 Law Ed. 1446. That was a case where plaintiff made shipments over defendant's line, paying the tariff rate, and subsequently sued the defendant, claiming that the rate was discriminatory and asking for the difference between the rate paid by it and lower rates resulting from rebates allowed other coal dealers making like shipments over the same road from the same point to the same destination. The court says at page 197 that although this action was brought to enforce a cause of action given by Section 8 of the Act, providing that any carrier doing any act prohibited by the statute should be "liable to the person injured thereby for the full amount of damages sustained in consequence of any such violation," plaintiff did not allege or prove that it suffered any damage. Plaintiff contended that this was unnecessary, that the excess over rates paid by others was unlawfully collected, and that, as a matter of law, it was entitled to recover as damages the same rate per ton on all of its shipments as had been rebated any other person on any of his ton- [fol. 82] nage shipped at the same time over the same route. The court refused to so hold, saying:

"3. There were many provisions in the statute for imprisonment and fines. On the civil side the Act provided for compensation—not punishment. Though the Act has been held to be in many respects highly penal, yet there was no fixed measure of damage in favor of the plaintiff. But, as said in Parsons v. Chicago & N. W. Railway, 167 U. S. 447, 460, construing this section (8) 'before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury.' Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what though called damages would really be a penalty, in addition to the penalty payable to the Government."

* * * * * * *

"The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be

the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved they could not be recovered. Whatever they were they could be recovered, because Section 8 expressly declares that wherever the carrier did an act prohibited or failed to do any act required, it should be 'liable to the person injured thereby for the full amount of damages sustained in consequence of such violation, * * * together with reasonable attorney's fees.' In view of this language it becomes necessary to inquire what the evidence shows was the injury in- [fol. 83] flicted or the damage sustained by the plaintiff in 1901 in consequence of paying rebates in 1901 on contract coal sold in 1899."

* * * * * * *

"There was no proof of injury—no proof of decrease in business, loss of profits, expense incurred or damage of any sort suffered—the plaintiff claiming that, as matter of law, the damages should be assessed to it on the basis of giving to it the same rate, on all its tonnage, that had been allowed on any contract coal shipped, on the same dates, whether such tonnage was great or small."

* * * * * * *

"The limitation of liability to the persons damaged and to an amount equal to the injury suffered is not out of consideration for the carrier who has violated the statute. On the contrary, the act imposes heavy penalties, independent of the amount of rebate paid, and as each shipment constitutes a separate offense, the law in its measure of fine and punishment is a terror to evil doers. But for the public wrong and for the interference with the equal current of commerce these penalties or fines were made payable to the Government. If by the same act a private injury was inflicted a private right of action was given. But the public wrong did not necessarily cause private damage, and when it did, the pecuniary loss varied with the character of the property, the circumstances of the shipment and the state of the market, so that instead of giving the shipper the right to recover a penalty fixed in amount or measure, the statute made the guilty carrier liable for the full amount of [fol. 84] damages sustained,—whatever they might be and whether greater or less than the rate of rebate paid.

"This conclusion, that the right to recover is limited to the pecuniary loss suffered and proved is demanded by the language of the statute, the construction put upon it years ago in the Parsons Case, and is the view taken in the only other case we find in which this question, under the Act to Regulate Commerce, has been construed."

* * * * * * *

"In view of the express provisions of Section 8 of the Act to Regulate Commerce, it was error to refuse to charge that 'to entitle the plaintiff to recover, the jury must be satisfied that it sustained some loss or injury due to the fact that the defendant was carrying at the same time at lower rates coal shipped by other shippers.'"

The same rule requiring affirmative proof of damage has been adopted by the Federal courts in cases where other phases of discrimination and undue prejudice were under consideration:

Lehigh Valley R. Co. vs. American Hay Co., 219 Fed. 539 (C. C. A.). This was an action to recover damages for a discrimination by the defendant railroad company in that certain free reconsigning privileges were accorded by the tariff to plaintiff's competitors at one station which were not accorded to plaintiff at his station, plaintiff being required to pay the tariff rate of $2.00 per car not exacted from his competitors in connection with similar shipments. Both the charge to plaintiff and the free service to its competitors [fol. 85] were provided for by the tariffs. With reference to defendant's contention that plaintiff could not recover unless it proved that it was damaged, the court said that it was not enough to show that the plaintiff paid defendant $2.00 per car for the reconsigning service:

"for aught that appears the persons to whom it sold may have themselves paid all those charges, or some of them, or some part of each charge. Just how the initial payment of each $2 resulted in damages to the company, if it were damaged, is a matter wholly within the knowledge of the Hay company, and not presumably within the knowledge of the railroad company. Proof that damages did result from the initial payment is part of the plaintiff's case, and, without affirmative proof to show such damages, it was not entitled to a verdict."

Homestead Co. v. Des Moines Electric Co., 248 Fed. 439 (C. C. A.). This was an action to recover damages for discrimination resulting from collecting lesser charges from plaintiff's competitors for a contemporaneous service rendered under substantially similar circumstances. The court says at page 442:

"Unjust discrimination will not sustain an action against a public service corporation, in favor of the injured competitor, for the difference between the amount he paid and the amount he would have paid if he had paid at the same rate as his competitor similarly situated for like service, as for money had and received, or any other action at law, except an action in tort for his damages. [fol. 86] Nor is such difference the measure of his damages. They may be the same as, or more or less than, such difference, and they must be pleaded and proved before they may be recovered. Pennsylvania R. Co. v. International Coal Co., 230 U. S. 184."

Knudsen-Ferguson Fruit Co. v. Michigan Cent. R. Co., 148 Fed. 968 (C. C. A.). Plaintiff sought to recover damages because of the collection by defendant of a tariff charge which plaintiff contended was unlawful because expressly prohibited by the Interstate Commerce Act. After stating that this action was brought under the eighth section of the Interstate Commerce Act and quoting that section, the court says:

"To support a recovery under this section, there must be a showing of some specific pecuniary injury. A cause of action does not necessarily arise from those acts or omissions of a common carrier that may subject it to a criminal prosecution by the government or to corrective or coercive proceedings at the instance of the commission. It is not every imperfect or inaccurate specification of rates in the schedules that will give to a shipper a cause of action for damages. He must show, either that there has been some unreasonable or excessive charge imposed, or some unlawful discrimination practiced against him. The plaintiff here, having founded his cause of action upon a technical construction of the law, and without the basis of any ruling or order of the commission, seeks to recover without proof of pecuniary damages."

* * * * * * *

[fol. 87] "The record before us discloses no finding and ruling of the commission against the reasonableness of the rates, and there was no proof upon the subject. There was no proof that what the plaintiff actually paid was in excess of a reasonable compensation for the services performed, whether considered separately or in the aggregate; nor does it appear that any discrimination of any kind or character was practiced against it. In the absence of a showing of injury or damage, there can be no recovery."

It is clear from the above authorities that even though a rate is unlawful under Section 2 or 3, there can be no recovery of the unlawfulness excess, without proof of actual damages sustained by the shipper. Mere proof of payment of an unlawful excess is not sufficient under Sections 2 and 3. We have seen above that the unlawfulness under Section 4 is of the same nature as that under Sections 2 and 3, in that it is dependent upon a comparison with some other rate, and that it is unlike the unlawfulness under Section 1, which is inherent in the rate itself. It would seem to follow on principle that there should be no recovery under Section 4 upon mere proof of unlawfulness, unless the shipper can go farther and prove that he has sustained damage; and this in fact has been the ruling of the Commission in many well considered decisions.

We will content ourselves with citing only decisions of the Commission involving demands for reparation based on violations of the Fourth Section:

[fol. 88] Oregon Fruit Co. v. Southern Pacific Co., 50 I. C. C. 719. In this case complainant asked reparation, alleging that the rates paid on watermelons shipped from California to Oregon were unreasonable, unjustly discriminatory and violative of the long and short haul clause of the Fourth Section. The commission specifically found that the rates complained of were not unreasonable in violation of Section 1, and not violative of either Sections 2 or 3, but found violations of the Fourth Section not protected by Fourth Section applications. The Commission denied reparation for violation of the Fourth Section upon the ground that plaintiff had not

proved that it was damaged thereby. At page 722 the Commission says:

"It has frequently been held that nothing in the act to regulate commerce warrants a presumption of damage. The distinction is plain between the carrier's unlawful act, which might render it liable to prosecution, and the shipper's right to damages for the injury, if any, occasioned thereby.

"In the absence of proof of damage to the shipper the fact that carriers have charged or received rates which violate the long and short haul rule of the fourth section of the act is not of itself a sufficient basis for an award of reparation. Penna. R. R. Co. v. International Coal Co., 230 U. S. 184; Nix & Co. v. S. Ry. Co., 31 I. C. C., 145, 149; Chattanooga Implement & Mfg. Co. v. L. & N. R. R. Co., 40 I. C. C., 146; La Crosse Shippers' Asso. v. C. I. & L. Ry. Co., 43 I. C. C. 520, 524; United States Glue Co. v. C. & N. W. Ry Co., docket No. 6832, unreported."

[fol. 89] Iten Biscuit Co. v. C. B. & Q. R. R. Co. et al., 53 I. C. C. 729. This was also a case where a shipper sought reparation, basing his claim on a violation of the Fourth Section. We desire to call particular attention to the Commission's language in this case, which we quote at length:

"With respect to the fourth section departures complainant insists that, regardless of the reasonableness of the rates from and to the more distant points, the rule of the fourth section is absolute, the collection of higher charges from and to Omaha was unlawful per se, and the excessive charges must as a matter of law be refunded.

"Distinction must be made between the carrier's unlawful act which renders it liable to prosecution and the shipper's right to damages for any pecuniary injury occasioned thereby. The original bill for an act to regulate commerce, which passed the Senate May 12, 1886, proposed, under Section 2, among other things, that a carrier violating the provisions thereof should be liable to respond in damages to the extent of the difference between the rate paid and the lowest rate charged upon like shipments; in section 3, after declaring unlawful any undue or unreasonable preference or advantage, it propesd to establish a cause of action in damages for violation of its provisions, but did not fix the measure of damages; and in section 4 the carrier was to be made liable to the person or persons against whom any excessive charges were made for all damages occasioned by a violation of the provisions thereof. But, as enacted, sections 2, 3 and 4 were amended by striking out the [fol. 90] clauses giving right of action for damages, and section 8 was substituted as a general section covering the omitted clauses of the three sections. In commenting on this omission the Supreme Court in Penna. R. R. Co. v. International Coal Co., 230 U. S. 184 said at page 198:

" 'The fact that this provision measuring the amount of recovery by rebate was omitted from the Act, as finally reported to both Houses and passed, is not only significant, but so conclusive against

the contention of the plaintiff that it quotes—not the report of the conference committee—but a statement made by a member of the Senate Conference Committee, to support the present argument that Sec. 8 means the same thing as the omitted clause. * * * Section 2 of the original Senate Bill said nothing about damages, but in case of rebating gave a shipper a right, in the nature of an action, for a penalty to be measured by the difference between the lawful and the unlawful rate, whether damage resulted or not. That provision was stricken out and Sec. 8 of the Act, as passed by both Houses of Congress and approved by the President, gave a right of action for damages and attorneys' fees to "the person injured"—and, of course, to the extent of the injury.'

"In discussing in this case the civil side of the act, the court said:

"'On the civil side the Act provided for compensation—not punishment. Though the Act has been held to be in many respects highly penal, yet there was no fixed measure of damage in favor of the plaintiff. But, as said in Parsons v. Chicago & N. W. Rail-[fol. 91] way, 167 U. S. 447, 460, construing this section (8), "before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury." Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what, though called damages, would really be a penalty, in addition to the penalty payable to the Government.'

"While in that case the court was dealing specifically with rebating under section 2, the right of action for damages was under section 8, which applies alike to sections 2, 3, and 4, and what was there said is equally applicable to section 4.

"Before an award of reparation can lawfully be made, damages must be proven. Where the unlawful act was the collecting of a rate which we find to have been unreasonable and more than just compensation for the service rendered, the Supreme Court has held, in effect, that damage is established by the very circumstances of the case. As was said in Southern Pac. Co. v. Darnell-Taenzer Co., 245 U. S., 531, 'The plaintiffs have paid cash out of pocket that should not have been required of them, and there is no question as to the amount of the proximate loss.' But where the unlawful act was the charging of a higher rate for a shorter than for a longer haul, in violation of the provisions of the fourth section of the act, it does not follow that the higher rate was unreasonable or more than it should justly have been required for the service performed. As we find was the fact in the present instance the higher rate may [fol. 92] have been reasonable per se and the lower rate too low. In such a case the violation should have been eliminated by raising the lower rate, and a complainant who paid the higher rate to or from the intermediate point would clearly not be entitled to reparation unless he could prove that the charging of the lower rate to or from the more distant point subjected him to prejudice and con-

sequent damage. In this instance as we have already seen, there is no such proof.

"It has been suggested that the decision of the Supreme Court in Southern Pac. Co. v. Darnell-Taenzer Co., supra, may support an award of reparation in this case without proof of damage. It has frequently been held that there is nothing in the act justifying a presumption of damage. In that case the reparation was awarded for the payment of an unreasonable rate and the question before the court was 'whether the fact that the plaintiffs were able to pass on the damage they sustained in the first instance by paying the unreasonable charge, and to collect that amount from the purchasers, prevents their recovering the overpayment from the carriers.' The court said that 'cases like Pennsylvania Railroad Co. v. International Coal Mining Co., 230 U. S. 184, where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less, are not like the present. There the damage depends upon remoter considerations.'

"Obviously it would be inconsistent, and contrary to the intent and spirit of the act, to hold that to recover under sections 2 and 3 there must be proof of damage and under section 4 the departure [fol. 93] therefrom is of itself proof of damage.

"We affirm our previous conclusion, and hold that in the absence of proof of the fact and amount of damage to complainant an unauthorized departure from the long and short haul rule of the fourth section of the act does not entitle complainant to an award of reparation."

Besides the four or five cases cited above in the Oregon Fruit Company opinion a similar decision was reached in the case of S. J. Greenbaum Co. v. Southern R. Co., 38 I. C. C. 715, at page 718, and was reaffirmed by unanimous decision in Illinois Brick Co. v. Director General, et al., 57 I. C. C. 320, at top of page 323. There had been dissents in some of the previous cases, but the majority opinions, and finally the entire Commission, have been consistently to the effect that the shipper cannot recover the excess payment under the Fourth Section by merely showing that he made the payment, but that he must go farther and prove that he was damaged by the fact that a lower rate was in force from the more distant point.

The respondent upon the hearing below referred to certain decisions of the Commission in which there have been Fourth Section violations and in which reparation was allowed, but they are all cases in which the rate was regarded as a violation of Section 1 as well as of Section 4. In some of these cases the lower rate for the longer distance had been established by the Commission in some [fol. 94] previous decision as the maximum reasonable rate for that distance. It followed necessarily that a higher rate for a shorter distance would be unreasonable in violation of Section 1 as well as unlawful in violation of Section 4, and in these cases reparation is allowed upon the former ground.

There are other cases in which the carrier had been maintaining

the higher intermediate rate through oversight and upon the discovery of the mistake had voluntarily reduced it, thus recognizing its unreasonableness, and in such cases also reparation is allowed by the Commission. But there is not a single decision allowing reparation without proof of damage in any case like the present one, where the lower rate for the longer distance was voluntarily established without order of the Commision and where, upon discovery of the violation, the higher intermediate rate was continued in force and the violation removed by raising the lower and longer rate. In such cases the decisions have been uniform to the effect that reparation will not be allowed without proof of damage.

Upon the hearing below, the respondent also cited a number of state court decisions and one or two Federal court decisions allowing recovery of reparation without proof of damage, but these decisions are all based upon state statutes and not upon the Fourth Section of the Interstate Commerce Act. All but one or two of these decisions were rendered before the decisions of the Supreme Court in the International Coal Company case, supra, and before the decisions of [fol. 95] the Commission in the Oregon Fruit Company and Iten Biscuit Company cases. It is true that some of the state statutes are identical in wording with the Federal statutes. It is clear, however, that on intrastate business a state court can construe a state statute as it sees fit and regardless of any contrary construction of a similar Federal statute. These courts chose to adopt the theory advanced by the plaintiff in the International Coal Company case and rejected by the court in that case, that mere proof of an unlawful excess payment, even though the unlawfulness arose from comparison with another rate, was sufficient to permit a recovery without proof of damage. This theory has been discarded by the United States Supreme Court and by the Interstate Commerce Commission, and we submit that it is entitled to no weight here.

It seems clear then:

1. That this action is outlawed under the two-year provision of the Interstate Commerce Act and under the decision in Phillips v. Grand Trunk Western Ry. Co., 236 U. S. 662, supra;

2. That even if the action had been commenced within the two-year period, it could not be sustained in this court, for the reason that no court has jurisdiction either to pass upon the lawfulness or unlawfulness of the rate collected, or to determine what would be a lawful rate, and for the further reason that if this were a court matter at all, it is necessarily and specifically based upon a violation of the [fol. 96] statute, and in such cases where courts have jurisdiction that jurisdiction is confined to the Federal courts;

3. That there is no actual violation of Section 4 shown because it is not shown that the appellant actually "charged" or "received" the lower rate for the longer distance; and

4. Because, even where a violation of the Fourth Section is shown and the action is brought within the proper time and before the

proper tribunal, no reparation is recoverable without proof that the plaintiff has actually suffered damage by reason of the publication of the lower rate for the longer distance.

It seems clear that this action must be dismissed for any one of the four reasons assigned by appellant. We respectfully submit that the judgment of the lower court should be reversed and the action dismissed.

Respectfully submitted, Hoke, Krause & Faegre, F. G. Dorety, R. J. Hagman, Attorneys for Appellant.

[fol. 97] STATE OF MINNESOTA:

SUPREME COURT

[Title omitted]

ORDER ENLARGING TIME

Ordered, that the time within which the printed Respondent brief must be served and filed herein, to comply with rule VIII of this court, be and it is extended to include October 26th, 1922.

Dated October 6th, 1922.

Calvin L. Brown, Chief Justice.

[fol. 98] STATE OF MINNESOTA, ss:

SUPREME COURT

[Title omitted]

BILL FOR COSTS—Filed Dec. 29, 1922

Costs and Disbursements

Statutory costs	$25.00
Printing Record	.....
Printing Brief	34.92
Clerk District Court for making return ($5.00)	.....
Clerk Supreme Court for filing return ($10.00)	.....
..... Affidavits (25 cents each)	.25
Postage and Express	.....
Transcript of case used only for appeal to Supreme Court, and not used in motion for a new trial	.....
Premium on appeal bond	.....
.....	.....
The above bill of costs and disbursements taxed and allowed Dec. 29th, 1922, at	$60.17

H. Mueller, Clerk Supreme Court of Minnesota, By P. O. Scow, Deputy. (Supreme Court Seal.)

STATE OF MINNESOTA,
County of Hennepin, ss:

W. W. Patterson, being first duly sworn, deposes and says, that he is one of the Attorneys for the respondent in the above entitled action; that the foregoing is a true and correct statement of the costs and disbursements of said respondent in the above entitled proceeding, and that all of the items of such disbursements have been actually and necessarily paid or incurred therein, by and on behalf of said respondent.

W. W. Patterson.

Subscribed and sworn to before me, this 26th day of December, 1922. Lasetta Maddaus, Notary Public, Hennepin County, Minn. (Notarial Seal.) My commission expires 11/1, 1925.

SIR:

Please take notice. That the costs and disbursements of the respondent in the above entitled action will be taxed by and before Herman Mueller, Clerk of the Supreme Court of Minnesota, at his office in the Capitol, at St. Paul, Minnesota, on Friday, the 29th day of December, 1922, at 10 o'clock in the forenoon of said day, and that the foregoing is a statement of the items of costs and disbursements that will then and there be claimed on behalf of said respondent and inserted in a judgment in said action that will then and there be entered.

Very respectfully, Devaney & Edwards, W. W. Patterson, Attorneys for Respondent, 1132–56 Builders Exchange, Minneapolis, Minnesota. To F. G. Doherty, R. J. Hagman, Hoke, Krause & Fagre, Attorneys for Appellant.

[fol. 99] [File endorsement omitted.]

[fol. 100] IN THE SUPREME COURT OF MINNESOTA

370—5/22

[Title omitted.]

OPINION, HOLT, J.—Filed Dec 15, 1922

Syllabus

Section 4 of the Interstate Commerce Act declares a published tariff of a carrier unlawful which charges more for a shorter haul than for a longer, the shorter haul being a part of the line or route of the longer, therefore, the maximum rate that can be collected by the carrier for the shorter haul would be the established tariff for the longer haul, and what is received in excess thereof may be recovered in an action as for money had and received for the shipper's use.

In such an action it is not necessary to show shipments over the longer haul upon which charges were paid as per the published tariff.

Nor need damages be proven except that the charges collected by the carrier exceeded the published tariff for the longer haul.

Of such an action a state court has jurisdiction.

Affirmed.

Opinion

The main facts are these: Between Aug. 23, 1913, and Sept. 3, 1914, plaintiff shipped over the line of defendant, a common carrier, 37 cars of wheat from Benchland, Montana, to Minneapolis and Duluth, Minn. During that period defendant's published tariff rate for transporting wheat was 30 cents per cwt. from Benchland to the [fol. 101] destinations mentioned, and 28 cents per cwt. from Billings to the same destination points, although the haul is 152 miles longer from Billings than from Benchland, which is an intermediate point on defendant's line of railway running from Billings to Minneapolis or Duluth. Plaintiff accordingly paid 2 cents per cwt. more for the shorter haul than for the longer, or in all $590.26 more than if defendant had carried the wheat from Billings 152 miles farther. Plaintiff sued for this as being a payment in excess of the lawful rate and recovered. Defendant appeals from the judgment.

Plaintiff predicates the right of recovery upon §4 of the Interstate Commerce Act, which so far as pertinent to this appeal reads: "That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this Act; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance."

Plaintiff's theory is that the maximum rate for the shorter haul is under said section — the published tariff for the longer haul, since the law declares the published higher tariff for the shorter haul unlawful. Defendant's contention is that under the Act the published tariff being unlawful, because greater for the shorter haul than for the longer, there was no legal rate from Benchland, hence redress [fol. 102] may be had only through the Interstate Commerce Commission, which must first determine what would have been a lawful and reasonable rate, and then order reparation if defendant had received more. If the amount collected was no more than reasonable, plaintiff was not damaged unless injured by the discrimination in favor of competitors shipping from Billings. If this contention be sound it would follow that the court had no jurisdiction, for no application has been made to the commission for relief and, when this action was begun, the time to present the claim to the Commission had expired (§16 of the Act).

Respondent concedes that the rulings of the Interstate Commerce Commission is in harmony with the contentions of appellant. Oregon Fruit Co. v. Southern Pacific R. R. Co. 50 I. C. C. 719 and Iten Biscuit Co. vs. Chicago Burlington & Quincy Ry. Co. 53 I. C. C. 729 are the most recent decisions on the subject. The logic of the conclusion may be somewhat weakened by Ryan Fruit Co. v. Director General 60 I. C. C. 733, where the shippers were allowed a refund without any proof of damages other than the mere fact that the carrier had violated §4 by charging a greater compensation for a through rate than the aggregate of the intermediate rates. However, the Federal Circuit Court of Appeals for the 9th district has reached a conclusion at variance with that of the Interstate Commerce Commission and which appeals to this court as right. The holding on the point under consideration is thus expressed by that court in the syllabus in Davis v. Parrington 281 Fed. 19; "The collection by a carrier of a rate in excess of the rate charged by it for a longer haul over the same route, without the permission of the Commission first having been obtained, is the collection of an illegal rate, and the excess of such rate over the rate for the longer haul may be recovered by an action in the court without resorting first to proceedings before the Interstate Commerce Commission, since the [fol. 103] court exists under Interstate Commerce Act §89". In this question is clearly not administrative, and the remedy by action in instance there was no permission from the Commission to charge a higher rate from Benchland than from Billings. The case also holds that the two year limitation contained in §16 of the Act does not apply where a suit at law lies without any action first being taken by the Commission. In such a suit the limitation statutes of the state determine whether or not the claim is barred.

When a carrier undertakes to establish a greater rate or tariff for a certain haul than a statute permits, and such statute also fixes the carrier's published tariff for a longer haul as the maximum for that certain shorter haul, the excess collected over such maximum should be held as an overcharge, recoverable in an ordinary action at law as money had and received for the use of plaintiff. In the determination of such an issue the court has no occasion to pass upon the lawfulness or reasonableness of the rate collected for the statute has determined that. This position is fortified by decisions based upon provisions in state statutes and constitutions similar to those in §4 of the Interstate Commerce Act. California Adjustment Co. v. Southern Pac. R. R. Co. 237 Fed. 954, (on certiorari dismissed in 248 U. S. 593); Louisville & Nashville R. R. Co. v. Walker 110 Ky. 961; California Adjustment Co. v. Atkinson, Topeka & S. F. R. R. 179 Cal. 140; McGrew Coal Co. v. Missouri Pac. R. R. Co. 280 Mo. 466 (affirmed in 256 U. S. 134).

These authorities also dispose of defendant's contention that it must be shown that the carrier actually charged or received the lower rate for the longer haul, holding, in effect, that the published lower tariff for the longer haul does so show.

The same may be said of the proposition that no recovery can be [fol. 104] had without proof of actual damages. Under the Par-

rington case, and the other court decisions above cited, the unlawful published rate for the shorter haul put in operation the published rate for the longer haul, and to the extent that more was collected from the shipper that much, at least, was his damage. It was that much money wrongfully taken out of his purse.

Another point made by defendant is that the state courts have no jurisdiction of cases predicated upon violation of the Interstate Commerce Act, §9 thereof expressly confining such jurisdiction to the Commission and the federal courts. That is true as to damages when the amount thereof has to be determined from facts other than simply collecting more than the lawful published tariff. But §22 of the Act provides: "And nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies". This would seem to authorize an action in a state court to recover the amount exacted above the charge permitted by §4 for the longer haul.

The writer would be content to follow the decisions of the Interstate Commerce Commission in the absence of a determination by the Supreme Court of the United States, the final authority. The construction placed upon the Act by the Commission results in a more equal and uniform treatment of shippers and carriers, and subjects all claims arising out of a violation of the act to the same limitation.

The judgment is affirmed.

[fol. 105] STATE OF MINNESOTA:

SUPREME COURT

[Title omitted]

JUDGMENT—Filed Dec. 29, 1922

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the Judgment, of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Hennepin, be and the same hereby is in all things Affirmed.

And it is further determined and adjudged that Respondent, herein, do have and recover of Appellant, herein the sum and amount of Sixty and 17/100 Dollars, ($60.17) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed Dec. 29th, A. D. 1922.

By the Court.

Attest: Herman Mueller, Clerk.

Statement for Judgment

Statutory Costs	$25.00
Printer	34.92
Clerk	.....
Acknowledgments	.25
Return	.....
Postage and Express	.....
Filing Mandate	.....
Transcript	.....
Appeal Bond	.....
Total	$60.17

[fol. 106] STATE OF MINNESOTA, ss:

SUPREME COURT

Herman Mueller of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul Dec. 29, A. D. 1922.

Herman Mueller, Clerk. By Peter O. Scow, Deputy. (Seal of Supreme Court, State of Minnesota.)

[File endorsement omitted.]

[fol. 107] STATE OF MINNESOTA:

IN SUPREME COURT

No. 23141

[Title omitted]

CLERK'S CERTIFICATE

I, Grace F. Kaercher, Clerk of the Supreme Court of the State of Minnesota, and custodian of the records thereof, do hereby certify to the Honorable Supreme Court of the United States of America that the foregoing Record, Appellant's Brief, Order extending respondent's time to serve and file briefs, Affidavit and Notice of taxation of costs, opinion, and final Judgment entered, are full, true and correct copies of the originals thereof on file and of record in my office; and constitute the entire transcript of record of the above

entitled case, including all of the proceedings had in the Supreme Court of the State of Minnesota and including appellant Great Northern Railway Company's brief filed in the Supreme Court of the State of Minnesota.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at St. Paul, Minnesota, this 12th day of January, 1923.

Grace F. Kaercher, Clerk Supreme Court, State of Minnesota.
(Seal of Supreme Court, State of Minnesota.)

[fol. 108] STATE OF MINNESOTA,
County of Hennepin:

DISTRICT COURT, FOURTH JUDICIAL DISTRICT

[Title omitted]

CLERK'S CERTIFICATE

I, Walter A. Ryberg, Clerk of the above entitled Court and custodian of the records thereof, do hereby certify to the Honorable Supreme Court of the United States of America that the summons and complaint in the above entitled action, brought to recover Five Hundred Ninety and 26/100 Dollars ($590.26) with interest, was filed on the 25th day of September, 1919; and that no return of the service of the said summons or complaint on the defendant was filed or is of record in my office; and that the records of this office do not indicate whether or not the said summons and complaint were ever served on defendant.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at Minneapolis, Minnesota, this 12th day of January, 1923.

Walter A. Ryberg, Clerk District Court of the Fourth Judicial District of the State of Minnesota, County of Hennepin. [Seal of District Court, Hennepin Co., Minn.]

[fol. 109] IN THE SUPREME COURT OF THE STATE OF MINNESOTA

[Title omitted]

WRIT OF CERTIORARI AND RETURN—Filed Aug. 10, 1923

I, Grace F. Kaercher, Clerk of the Supreme Court of the State of Minnesota, do hereby certify that the transcript of the record of the proceedings in this court in the above entitled cause, heretofore certified by me for filing in the Supreme Court of the United States, was correct and complete as the same then appeared in this court.

In pursuance of the command of the writ of certiorari issued out of the Supreme Court of the United States and directed to the Supreme Court of the State of Minnesota, dated March 12th, 1923, I now hereby certify that on the 31st day of March, 1923, there was filed in my office a stipulation in the above entitled cause in the following words towit:

[fol. 110] STATE OF MINNESOTA:

MINNESOTA SUPREME COURT

[Title omitted]

STIPULATION—Filed Nov. 31, 1923

The Supreme Court of the United States having on the 12th day of March, 1923, issued a writ of certiorari in the above entitled proceeding, directed to the Supreme Court of the State of Minnesota, which said writ has been filed with the Clerk of the Supreme Court of the state of Minnesota.

It is hereby stipulated and agreed, by and between the parties herein, by their respective counsel, that the transcript of record which was heretofore certified by the Clerk of the Supreme Court of the State of Minnesota and which appellant Great Northern Railway Company filed with the Clerk of the Supreme Court of the United States at the time of filing its application for a writ of certiorari, shall be taken and considered as a return to the said writ of certiorari and a compliance with the said writ of certiorari requiring that the Supreme Court of the state of Minnesota send to the Supreme Court of the United States the record and proceedings in said cause.

Dated this 27th day of March, 1923.

Frederick M. Miner, Devaney & Edwards, John P. Devaney, De Witt Clinton Edwards, Walter W. Patterson, Attorneys for Respondent. F. G. Dorety, R. J. Hagman, Attorneys for Appellant.

[File endorsement omitted.]

[fol. 111] I further certify that the above is a true and correct copy of said stipulation and of the whole thereof.

Witness, My official signature and the seal of the said Supreme Court of the State of Minnesota at the City of St. Paul, in said State of Minnesota this 7th day of August, 1923.

Grace F. Kaercher, Clerk of the Supreme Court of the State of Minnesota. (Seal of the Supreme Court, State of Minnesota.)

[fol. 112] UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Minnesota, Greeting:

Being informed that there is now pending before you a suit in which Great Northern Railway Company is appellant, and McCaull-Dinsmore Company is respondent, No. 23141, which suit was removed into the said Supreme Court by virtue of an appeal from the District Court for the County of Hennepin, Fourth Judicial District, of the State of Minnesota, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States, do hereby command you that [fol. 113] you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twelfth day of March, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[fol. 114] [File endorsements omitted.]